TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 202

CHARLES C. CHILDERS, STATE AUDITOR OF THE STATE OF OKLAHOMA, APPELLANT,

vs.

JOHN BEAVER AND BENJAMIN QUAPAW

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED NOVEMBER 14, 1924

(30,691)

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[fols. 1-3] CITATION—In usual form, showing service on Joseph W. Howell; omitted in printing

[fol. 4] **IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA**

In Equity. No. 3003

JOHN BEAVER and BENJAMIN QUAPAW, Plaintiffs,

vs.

C. C. CHILDERS, State Auditor of the State of Oklahoma, Defendant

AMENDED BILL OF COMPLAINT—Filed Nov. 22, 1923

To the Honorable Judge of the United States Court for the Eastern District of Oklahoma:

Plaintiffs, with leave of Court, by their undersigned solicitor, bring this their amended bill of complaint against the defendant named in the caption above, and thereupon complain and show the Court:

I

Plaintiffs are both citizens of the State of Oklahoma and residents of the County of Ottawa, in said State, in the Eastern District of Oklahoma.

Defendant, C. C. Childers, is a citizen of the State of Oklahoma, and a resident of, and can be found at Oklahoma City, Oklahoma, in the Western District of said State. He was duly elected to the Office of State Auditor of the State of Oklahoma, and is the duly qualified and acting incumbent of that office. The full name of said defendant is unknown to plaintiffs. Therefore, his name appears in the caption partly by initials.

II

This is a suit of a civil nature of which the District Courts of the United States have original jurisdiction, involving Federal questions, to-wit: The construction of the Act of Congress of March 2, [fol. 5] 1895, (28 Stat., 876, 907), by which restrictions on the alienation of Quapaw Indian allotments were imposed for a period of 25 years, and the Act of Congress of March 3, 1921, (41 Stat., 1225, 1248), extending such restrictions for a period of 25 years from the date thereof, in connection with the Inheritance Tax laws of the State of Oklahoma, approved March 15, 1915, (S. L. 1915, p. 215), and March 25, 1919, (S. L. 1919, p. 429), which impose

an inheritance tax on Inherited Estates, and make such property subject to sale for failure to pay said tax.

It also involves, in connection with said laws of Oklahoma, a construction of the 2nd paragraph of Article VI of the Constitution of the United States, making said Constitution, and the laws and treaties made in pursuance thereof, the Supreme Law of the Land, as well as Article V of the Amendments to the Constitution of the United States, and Section 1 of Article XIV of said Amendments, which guarantee that no person shall be deprived of property without due process of law.

This suit is instituted by plaintiffs in their own names and right but under contracts authorized and approved by the Commissioner of Indian Affairs and the Secretary of the Interior.

III

They allege that they, John Beaver and Benjamin Quapaw, were brother and husband, respectively, of one See-Sah Quapaw, who in her lifetime was a member of the Quapaw Tribe of Indians in Ottawa County, Oklahoma, and who died on the 4th day of March, 1920, in said County, seized of certain lands therein, located in said Eastern District, which she acquired, in part, by allotment as a member of said Tribe, and, in part, by inheritance from her deceased daughter, Hum-bah-wat-tah, who died on or about June 15, 1900; that plaintiffs were the sole and only heirs of said See-Sah Quapaw and inherited her said estate in equal shares; that none of said lands have been partitioned among the heirs.

That the lands allotted to the said See-Sah Quapaw in her own [fol. 6] right, are described as follows:

Southeast quarter, and the southeast quarter of the northeast quarter of Section thirty (30), township twenty-nine (29) north, range twenty-three (23) east of the Indian Meridian, Ottawa County, Oklahoma.

That the lands of the said Hum-bah-wat-tah were acquired by her [illegible] her lifetime as an allottee of the Quapaw Tribe of Indians, and [illegible]ed by inheritance to her father and mother, the said See-Sah Quapaw and Benjamin Quapaw, that the description of the allotment of said Hum-bah-wat-tah is as follows:

East half of the northwest quarter, the west half of the northeast quarter and the northeast quarter of the northeast quarter of Section thirty (30), township twenty-nine (29) north, range twenty-three (23) east of the Indian Meridian, Ottawa County, Oklahoma.

Furthermore, upon information and belief, plaintiffs allege that, on or about the 26th day of September, 1896, the United States, pursuant to and upon the terms, restrictions and conditions contained in the said Act of Congress, approved March 2, 1895, in due form, executed, issued, and delivered to the said See-Sah and Hum-bah-wat-tah Quapaw, respectively, patents to said described lands, it being

provided in said Act that such allotments should be inalienable for twenty-five years from and after the date of said patents; and that, in like manner, said patents recite that the lands therein described shall be inalienable for twenty-five years after the date thereof.

That said restrictions ran with the land and were in full force and effect on the dates when the said Hum-bah-wat-tah and See-Sah Quapaw died, to-wit, Jan. 15, 1900, and March 4, 1920, and have at all times since remained in force, but would have expired September, 25, 1921, except for the said Act of Congress, approved March 3, 1921, by which the restrictions aforesaid, on said lands, were extended for a period of twenty-five years from the date thereof.

That plaintiffs, John Beaver and Benjamin Quapaw, are both full-[fol. 7] blood Quapaw Indians and members of the Quapaw Tribe, of the non-competent class, and are under the supervision of the Quapaw Agency at Miami, Oklahoma, and are among those Indians specifically named in said Act of March 3, 1921, whose lands were made subject to restrictions against alienation for twenty-five years by virtue thereof; that the restrictions extended and imposed by said Act of March 3, 1921, apply both to allotted and inherited lands of the persons named therein and that all such lands are inalienable until such restrictions shall be removed in the manner provided by said Act.

IV

Plaintiffs are informed, and so allege, that the defendant claims that the transfer of said lands to them, by inheritance, was and is subject to the Inheritance Tax laws of the State of Oklahoma, and therefore insists and demands that plaintiffs pay to said State an Inheritance Tax, according to the rates prescribed by the State law, based upon the value of the estate of said See-Sah Quapaw as of the date of her death.

That defendant, in the supposed performance of the duties of his office, now proposes and threatens to enforce and collect, by summary process, the Inheritance tax which he claims is due from plaintiffs, as aforesaid, and to cause said lands to be sold if plaintiffs fail to comply with his demands.

V

The Act of Congress of March 2, 1895, (28 Stat., 876,907), contains the following provision, which was carried into the patents to the Quapaws, (including the patents by which the lands inherited by these plaintiffs were conveyed to the original allottees):

Provided, that said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents.

This restriction was extended by the Act of Congress of March 3, 1921, (41 Stat., 1225, 1248), which reads, in part, as follows:

[fol. 8] Sec. 26. That section 1 of the Act of Congress, approved March 2, 1895, (Twenty-eighth Statutes at Large, page 907), in so

far as the same relates to the allotments of land to the Quapaw Indians and to restrictions against alienation of said allotments, be and the same is hereby, amended so as to provide that the restrictions which now exist against the alienation of the lands allotted to and allotted lands inherited by the Quapaw Indians named in the letter of January 15, 1921, of the Secretary of the Interior, to-wit: naming John Beaver and others, including Benjamin Quapaw), and including any Quapaw allotted or inherited lands in which any of the said named Indians have any undivided interests, be, and the same are hereby, extended for the further and additional period of twenty-five years from the date of this Act: Provided, however, That the Secretary of the Interior may, with or without the application of the Indian owner, remove such restrictions, wholly or in part, after he has found such Indian owner to be as competent as the average white man to conduct his own business affairs with benefit to himself, under such rules and regulations as he may prescribe in regard thereto, and concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians:

Referring to the State Inheritance Tax of Oklahoma, Section 5 of the Legislative Act of March 25, 1919, supra, reads, in part, as follows:

Section 5. Section 8 of Chapter 162, Session Laws of Oklahoma, 1915, is hereby amended to read as follows:

Section 8. Every such tax shall be and remain a lien upon the property transferred until paid.

Said Act of March 25, 1919, also provides:

Section 7. Section 10, Chapter 162, Session Laws of Oklahoma, 1915, is hereby amended to read as follows:

Section 10. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will entitle him to pay such taxes in the same manner as he might be entitled by law to do for the payment of the debts of the decedent. * * * He shall not deliver or be compelled to deliver any specific legacy or property subject to the tax under this Act to any person until he shall have collected the tax thereon.

Plaintiffs allege that the foregoing provisions of the laws of the State of Oklahoma are in direct conflict with the Statutes of the United States quoted above, and are repugnant to the Supreme Law clause of the Constitution of the United States, as set forth in the 2nd paragraph of Article VI thereof; that the above described lands, which plaintiffs inherited from the said See-Sah Quapaw, are and al- [fol. 9] ways have been inalienable, and not subject to lien, except with the approval of the Secretary of the Interior.

VI

Plaintiffs further allege that the claims and demands of said defendant, C. C. Childers, are repugnant to, and in violation of, the

same, have clouded the title of plaintiffs to said lands, and will continue to cloud the title thereto until such claims are denied, set aside, and held for naught; that the laws of Oklahoma provide no relief where titles to lands are so included, nor do such statutes provide a plain, speedy and adequate remedy at law for plaintiffs, under the facts and circumstances herein stated.

VII

It is also alleged by plaintiffs that the claims and demands of defendant, C. C. Childers are repugnant to, and in violation of, the policy of the United States looking to the protection of said Indians, as prescribed by said Acts of March 2, 1895, and March 3, 1921.

Plaintiffs allege that they and their affairs are under the supervision of the United States, and more particularly of the Quapaw Agency in Ottawa County, Oklahoma; that the lands so inherited by them, and also their own allotments, are leased for mining purposes under leases approved by the Department of the Interior and are subject to the jurisdiction thereof; that their income is derived from restricted property and is held in trust by the United States, for their benefit, and is disbursed to them, or for them, pursuant to the rules and regulations and orders of the Interior Department; that all of the funds so held for them were acquired since the death of said See-Sah Quapaw, and are not subject to any lien on behalf of said Inheritance Tax and are not liable for the payment thereof.

VIII

Plaintiffs represent to this Honorable Court the fact to be that the [fol. 10] ordinary and usual functions of the Probate Court of Ottawa County, Oklahoma, are almost, if not entirely, suspended as to Quapaw estates while the same are subject to Federal restrictions; that the power to determine the heirs of Quapaw Indians rests exclusively with the Secretary of the Interior; that the estates of such Indians cannot be partitioned without the consent of said Secretary; that wills made by them are subject to his approval, and that, in exercising the power of approval, he is not bound by the laws of Oklahoma where such laws restrict the power of the testator to convey.

They accordingly allege that said Probate Court of Ottawa County is not vested with such full and complete jurisdiction over Quapaw estates as would entitle it to administer the State Inheritance laws with respect to such estates, either as to the appointment of administrators, or the partitioning of estates (where partition might be necessary), or as to the appraisement and sale of lands; and that the sale of plaintiffs' said lands, or the appraisement, without the approval of the Secretary of the Interior, would be contrary to the mode prescribed by the laws of Congress, and without due process of law, in violation of the Constitutional rights guaranteed these plaintiffs by Article V, and Section 1 of Article XIV, of the Amendments to the Constitution of the United States.

In this connection they also allege that they have been, and are, injured in their property rights by defendant's claim of right, pursuant to Section 7 of the Act of March 25, 1919, aforesaid, to take and hold their said property until the question of their liability to pay such tax, as well as the amount thereof, is determined, in that they have been deprived, constructively, of the right of peaceable possession and ownership, in an arbitrary manner and without due process of law, contrary to their Constitutional rights as guaranteed by the aforesaid Amendments to the Constitution of the United States.

[fol. 11] IX

Plaintiffs further allege that transfers of estates do not come within the purview of the Inheritance Tax laws of the State of Oklahoma, where, as in the case now submitted, such estates are otherwise exempt from taxation generally; that the imposition of any Inheritance Tax which would necessarily result, in the enforcement thereof, in a conflict with the laws of the United States, would be repugnant to the intent and purpose of the Constitution and laws of the State of Oklahoma; that the assertion of the right to collect such a tax or to take and hold the lands of plaintiffs to enforce the collection thereof amounts to an assertion of a right or interest in said property and is contrary to the Agreement of the State of Oklahoma with the United States, as set forth in Section 3 of Article I of the Constitution of said State, and is inconsistent with Section 1 of the Enabling Act of Congress providing for the admission of Oklahoma and Indian Territory as a State, approved June 16, 1906, (34 Stat., 267).

Wherefore, inasmuch as plaintiffs are without full and adequate remedy at law, and are only relievable in a court of equity, they pray that a writ of injunction be issued out of this Honorable Court restraining and enjoining defendant from collecting or attempting to collect any Inheritance Tax from them on account of the inheritance of any lands or other property from said See-Sah Quapaw, and that the claims of defendants be declared null and void and of no force and effect in law, and that the pretended lien on said lands be cancelled and forever held for naught, and the cloud on their titles be removed therefrom.

And may it please your Honor to grant to plaintiffs a writ of subpena to be directed to the said C. C. Childers, State Auditor of the State of Oklahoma, thereby commanding him at a time certain and under a certain penalty therein to be limited, to personally appear before this Honorable Court, and then and there, full, true and [fol. 12] direct and perfect answer make to all and singular the premises, and to stand and perform, and abide by such orders, direction and decree, as may be made against him, in the premises, as shall be just and equitable, and that plaintiffs may recover their costs herein expended.

(Sgd.) Joseph W. Howell, Solicitor for Plaintiffs.

[fols. 13 & 14] Sworn to by Joseph H. Howell. Jurat omitted in printing.

[ol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO AMENDED BILL OF COMPLAINT—Filed Nov. 16, 1923

To the Honorable Robert L. Williams, Judge of the United States District Court within and for the Eastern District of Oklahoma:

Comes now the Defendant, C. C. Childers by his Attorneys, George F. Short, Attorney General of Oklahoma, Clifford W. King and Leon S. Hirsh, Assistant Attorneys General of Oklahoma, and for answer to the Amended Bill of Complaint filed herein by the Plaintiffs, respectfully shows to the court;

I

That he does not deny, but specifically admits all of the allegations of fact contained in said Amended Bill of Complaint except these, to-wit:

First. Defendant respectfully denies that the lands described in said Amended Bill are restricted by any constitutional or statutory provision of the United States to the result that the said lands are non-taxable in their devolution under the provisions of the Inheritance Tax laws of the State of Oklahoma, approved March 15th, 1915 (Session Laws 1915, page 215), and March 25th, 1919 (Session Laws [fol. 16] 1919, page 429).

Second. Defendant also respectfully denies that the said Inheritance Tax Laws of the State of Oklahoma are repugnant to or in conflict with the statutes and or the Constitution of the United States; and denies that the lands described in said Amended Bill are not subject to the lien provided in said Inheritance Tax Laws.

Third. And defendant, while admitting all al-egations of ultimate fact in said Amended Bill contained, further and specifically denies all allegations of said Bill wherein the tenor, intent, effect, and application of laws of the United States or of the State of Oklahoma, are alleged as facts.

II

And for further answer Defendant respectfully shows that said Inheritance Tax Laws of the State of Oklahoma are valid, existing, and fully authorized enactments of the Legislature of the State of Oklahoma, not in conflict with any constitutional and or statutory provisions of the United States, and or of the Constitution of Oklahoma, and that said Inheritance Tax Laws are directly applicable in every particular and provision to the Plaintiffs herein and to the lands described in said Amended Bill of Complaint.

Wherefore, the premises considered, Defendant prays that this Honorable Court deny any and all relief asked by said Plaintiffs, and

further requests that decree be rendered in behalf of said Defendant, adjudging him his reasonable costs herein expended in this behalf.

C. C. Childers, State Auditor of the State of Oklahoma, by George F. Short, Attorney General of Oklahoma. Clifford W. King and Leon S. Hirsh, Assistant Attorneys General.

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION OF FACTS—Filed Nov. 22, 1924

It is hereby agreed, by and between the parties to the above entitled cause, through their undersigned solicitors, that the allegations contained in the bill therein relating to the racial and tribal status of the plaintiffs, to the acquisition of the lands described in the bill by the original owners through allotment, and the acquisition of said lands by plaintiffs through inheritance, and all other statements of ultimate facts, are true and correct, including the allegation that defendant, C. C. Childers, claims that the Inheritance Tax Laws of the State of Oklahoma are applicable to the transfer, to Plaintiffs, of the estates mentioned and described in the bill of complaint, and that he intends and threatens to enforce collection of such taxes, on said transfer, by summary process in his official capacity.

It is also agreed, as a fact, that there are certain laws, both Federal and State, which are referred to in the bill, that relate to Indian lands in Oklahoma.

It is not intended by this stipulation to agree upon the construction or effect of said laws, as contended for in the bill, or upon any other legal conclusion, deduction or inference therein stated or implied; it being the purpose of the undersigned Solicitors to confine the issue in the above entitled cause to the sole question of whether transfers by inheritance of Indian property of the kind and under the circum-[fol. 18] stances mentioned in the bill of complaint are subject to the Inheritance Tax laws of the State of Oklahoma, for the guidance of both State and Federal officers concerned in the administration of such matters.

Joseph W. Howell, Solicitor for Plaintiffs. George F. Short, Attorney General; C. W. King, Assistant Atty. Gen.; Leon S. Hirsh, Assistant Attorney General, Solicitors for Defendant.

[File endorsement omitted.]

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—July 19, 1924

1. Indians—Congress Vested with Exclusive Power to Legislate with Reference to Their Restricted Property.—Congress has the exclusive power to legislate with reference to the various Indian Tribes as a dependent people concerning their restricted property, or property held in trust by the United States for their use and benefit, and the fact that Federal citizenship has been conferred upon such Indians in no way militates against this power.

2. The properties of restricted Indians do not become subject to the operation of the laws of the State until all restrictions on the right of alienation have been removed by the Congress.

3. The estate of a restricted deceased Quapaw Indian held in trust by the United States for the heirs cannot be subjected to the payment of an inheritance tax as provided by the laws of the State of Oklahoma.

In Equity

Action by John Beaver and Benjamin Quapaw against George F. Short, Attorney General, and C. C. Childers, State Auditor, of the State of Oklahoma, for an injunction to restrain the collection and enforcement of an inheritance tax against plaintiffs by reason of their inheritance of the estate of one See-Sah Quapaw, a portion of which is a restricted Quapaw Indian allotment located in Ottawa County, Oklahoma.

Joseph W. Howell, Esq., for plaintiffs.

George F. Short, Attorney General; C. W. King, and Leon S. Hirsh, Assistant Attorneys General, for the defendants.

[fol. 20] KENNAMER, District Judge:

See-Sah Quapaw, a full blood restricted Quapaw Indian, died intestate on March 4, 1920, leaving as her only heirs, John Beaver and Benjamin Quapaw, full blood Quapaw Indians, husband and brother respectively of the deceased. The estate inherited by said heirs consisted of the allotment of the deceased, patented on or about September 26, 1896, by virtue of the Act of Congress of March 2, 1895 (28 Stat. 907) Ch. 188) the same being inalienable for a period of twenty five years from and after the date of patent. By virtue of the provisions of the act of Congress of June 25, 1910 (36 Stat. 855 and other supplemental statutes), the Secretary of the Interior determined the heirs of See-Sah Quapaw in accordance with the laws of descent and distribution of the State of Oklahoma, and the Superintendent of the Quapaw Indian Agency, as administrator,

now holds the lands in trust for the benefit of these heirs, and about $11,000.00 accumulated royalties from said restricted lands.

Counsel for the respective parties have stipulated that the bill filed by the plaintiffs correctly states the facts, and that the sole question to be determined in this action is whether the estate inherited by the plaintiffs from see-Sah Quapaw is subject to the inheritance tax provided by Section 9891 Compiled Oklahoma Statutes 1921, (Act of March 15, 1915, comprising Ch. 162 of the Session Laws of 1915, as amended by Act of March 25, 1919, Ch. 296 of the Session Laws of 1919 of Oklahoma), wherein "a tax is hereby laid upon the transfer to persons or corporations of property or any interest therein or income therefrom, when the transfer is by Will or the intestate laws of this state, by deed, or grant, bargain, sale or gift made in contemplation of the death of the grantor," etc.

[fol. 21] Section 9898 of said Code provided that "every such tax shall be and remain a lien upon the property transferred until paid."

The Attorney General, on behalf of the state, contends that the plaintiffs, although restricted Quapaw Indians, being citizens of the United States and of the State of Oklahoma, and the Congress by Act of April 28, 1904, (33 Stats. 573, Ch. 1824), having extended the laws of descent of the State of Arkansas over the Indian Territory and made them applicable in their operation so as to embrace all persons and estates, "whether Indian, Freedman or otherwise," and said laws having been superseded under the provisions of the Enabling Act (Act of Congress of June 16, 1906, 34 Stat. 267, Ch. 335) extending the laws of the Territory of Oklahoma in force, that the devolution of the estate of See-Sah Quapaw is controlled by the laws of descent and distribution of the State of Oklahoma, and that before said heirs of said deceased may succeed to said estate by virtue of said laws that the inheritance tax provided by the laws of Oklahoma must be paid. It is argued that on the admission of Oklahoma as a State all Federal laws of descent and distribution theretofore in force in Indian Territory, irrespective of the provisions of the Enabling Act, terminated, and that the State has the sole and exclusive power over the disposition of property under its jurisdiction. "The title and modes of disposition of real property, within a state, whether inter vivos or testamentary, are not *am*tters placed under the control of Federal authority." See U. S. v. Fox 94 U. S. 315, 28 L. Ed., 192. The rule is well established that the State has sole and exclusive power over the disposition of property under its jurisdiction.

McCormick v. Sullivant, 10 Wheat. 192; 6 L. Ed. 300;

[fol. 22] Schley v. Car Co., 120 U. S. 580, 30 L. Ed. 789;

United States v. Perkins, 163 U. S. 625, 41 L. Ed. 287;

Snyder v. Bettman, 190 U. S. 249, 47 L. Ed. 1035;

Wilcox v. Jackson, 13 Pet. 498, 10 L. Ed. 264;

Langdon v. Sherwood, 124, U. S. 74, 31 L. Ed. 344;

O'Callighan v. O'Brien, 199 U. S. 99, 50 L. Ed. 101;

Ellis v. Davis, 109 U. S. 485, 27 L. Ed. 1006;

Knowlton v. Moore, 178 U. S. 43, 44 L. Ed. 970;

Plumber v. Cole, 178 U. S. 115, 44 L. Ed. 998.

But this rule does not authorize or support the power of the State to impose and collect an inheritance tax upon the inheritable property of restricted Indians, over which the Congress has exclusive jurisdiction. The exclusive power of Congress to legislate with reference to the various Indian Tribes as a dependent people and concerning their property is no longer a debatable question, and the conferring of Federal citizenship upon such Indians in no way militates against this power.

In case of United States v. Thurston County, Nebraska, et al., 143 Fed 287, Judge Sanborn in delivering the opinion of the court said:

"Their civil and political status, however, does not condition the power, authority, or duty of the United States to exert its powers of government to control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit. Matter of Heff, 197 U. S. 488, 509, 25 Sup. Ct. 506, 49 L. Ed. 848; Buster v. Wright, 68 C. C. A. 505, 135 Fed. 947; Wallace v. Adams [fol. 23] (C. C. A.) 143 Fed 716, decided at this term. They are still members of their tribes and of an inferior and dependent race, of which the Supreme Court has said that 'from their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.' U. S. v. Kagama, 118 U. S. 375, 384, 6 Sup. Ct. 1109, 30 L. Ed. 228. The experience of more than a century has demonstrated the fact that the unrestrained greed, rapacity, cunning, and perfidy of members of the superior race in their dealings with the Indians unavoidably drive them to poverty, despair, and war. To protect them from want and despair, and the superior race from the inevitable attacks which these evils produce, to lead them to abandon their nomadic habits and to learn the arts of civilized life, the government of the United States has long exercised the power granted to it by the Constitution (article 1, Sec. 8, subd. 3) to reserve and hold in trust for them large tracts of land and large sums of money derived from the release of their rights of occupancy of the lands of the continent, to manage and control their property, to furnish them with agricultural implements, houses, barns, and other permanent improvements upon their lands, domestic animals, means of subsistence, and small amounts of money, and to provide them with physicians, farmers, schools and teachers."

In the case of Marchie Tiger v. Western Investment Company, 221 U. S. 386, the court said:

"From the earliest period Congress has dealt with Indians as dependent people and legislated concerning their property with a view to their protection as such.

[fol. 24] Congress has full power to legislate concerning tribal property of Indians, and the conferring of citizenship on individual

Indians does not prevent Congress from continuing to deal with tribal lands.

It is for Congress, in pursuance of long established policy of this Government, and not for the courts, to determine for itself when, in the interest of the Indian, government guardianship over him shall cease.

The privileges and immunities of Federal citizenship do not prevent such proper governmental restraint upon the conduct or property of citizens as may be necessary for the general good."

In the recent case of Sperry Oil & Gas Company v. Chisholm, 68 L. Ed. 392, the court held that the provisions of the Oklahoma Constitution, and applicable State statutes providing the manner of encumbering of homesteads within the State, had no application to restricted Indian lands. The Supreme Court of Oklahoma has held in numberous cases that restricted Indian lands are under the exclusive control and jurisdiction of the Congress of the United States.

Malone v. Wamsley, 80 Okl. 181, 195 Pac. 484;
Smith V. Williams, 78 Okl. 297, 190 Pac. 555;
Walker v. Brown, 43 Okl. 144, 141 Pac. 681;
Wilson v. Greer, 50 Okl. 387, 151 Pac. 629.

In the instant case the Congress having provided that the heirs of See-Sah Quapaw were entitled to take the property of the deceased subject to the laws of descent and distribution of the State of Oklahoma, it is beyound the power of the Legislature of the State to impose any burden or conditions upon the right of said heirs [fol. 25] to succeed to said estate, or to in any way burden the right of said heirs to inherit said property in contravention of the paramount Federal law.

Blanset v. Carden, 256 U. S. 319, 65 L. Ed. 950, 41 Sup. Ct. Rep. 519.

Restricted Indian lands do not become subject to the operation of the laws of the State until all restrictions from the right of the allottee to alienate have been removed and relinquished by the Congress.

Sperry Oil & Gas Co. v. Chisholm, Supra;
In Re Pigeons' Estate, 198 Pac. (Okl.) 309.

The plaintiffs in this action being restricted Quapaw Indians, and the estate inherited by them from See-Sah Quapaw being held in trust for them by the Government, is not subject to the inheritance tax law of the State of Oklahoma, and the injunction as prayed for by the plaintiffs is granted.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Filed Aug. 28, 1924

This cause coming on to be heard at the City of Vinita, Oklahoma, in the Eastern Judicial District of Oklahoma, on the 28th day of March, 1924, upon the Amended Bill of Complaint and Answer thereto, and upon a stipulation that the statements of ultimate facts, as set forth in the Amended Bill, are true and correct; and Joseph W. Howell, Esquire, for the Complainants, and George F. Short, Attorney General, C. W. King and Leon S. Hirsh, Assistant Attorneys General, for defendant, C. C. Childers, (the latter having been made sole defendant by amendment to the bill), having been heard both orally and by briefs, and the Court being fully advised in the premises;

Now, therefore, on this 19th day of July, 1924, it is adjudged, ordered, and decreed:

That the land and money involved in this suit were the property of one See-Sah Quapaw before and at the time of her death; that she was a restricted Quapaw Indian and the property aforesaid was held in trust by the United States, as restricted Indian property, under the control and supervision of the Secretary of the Interior, before, at the time of, and after, her death, pursuant to the Act of Congress, approved March 2, 1895, (28 Stat. 876, 907).

[fol. 27] That the property aforesaid passed by inheritance to the complainants in the manner provided for by the laws of succession of the State of Oklahoma, but by virtue and force of the laws of Congress, and is exempted from the operation of the Inheritance Tax Laws of the State of Oklahoma; it being beyond the power of the legislature of the State to impose any burden or condition upon the right of the heirs to succeed to the estate, or to in any way burden the right of the heirs to inherit the property in contravention of the paramount Federal Law.

That the claim of the defendant, C. C. Childers, that he is authorized and entitled, as State Auditor, to impose, demand, and collect by summary process, an inheritance tax upon said property, under the laws of the State of Oklahoma, is unwarranted and without authority of law, and the lien claimed upon said property is void and of no force or effect.

And it is further adjudged, ordered, and decreed that a permanent injunction be issued in this suit against the said defendant restraining and enjoining him, his associate and subordinate officers, and all persons acting through or under him or them, from collecting, or attempting to collect, any inheritance tax from the complainants, or at their expense, on account of the inheritance by them of the estate of the said See-Sah Quapaw, pursuant to the prayer of said Bill of Complaint.

F. E. Kennamer, United States District Judge.

[File endorsement omitted.]

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF PETITION FOR APPEAL—Filed Oct. 15, 1924

To the above-named plaintiffs, John Beaver and Benjamin Quapaw, and to Joseph W. Howell, Esquire, their solicitor of record:

The plaintiffs above named, John Beaver and Benjamin Quapaw, and their solicitor, Joseph W. Howell, Esquire, will please take notice that the above named defendant, Charles C. Childers, State Auditor of the State of Oklahoma, will present his petition for appeal and assignments of error to the Honorable F. E. Kennamer, Judge of [fols. 29 & 30] the United States District Court for the Eastern District of Oklahoma, sitting at Ardmore, at the United States District Court Rooms in the said city of Ardmore within the said Eastern District of Oklahoma on Wednesday, October 15th, 1924, at one o'clock A. M., or as soon thereafter as counsel may be heard. A copy of the aforementioned petition for appeal and assignments of error are attached hereto and made a part of this notice by reference thereto.

George F. Short, Attorney General of Oklahoma; C. W. King, Leon S. Hirsh, Assistant Attorneys General of Oklahoma, Solicitors for Defendant, Charles C. Childers, State Auditor of the State of Oklahoma.

Acknowledgment

Service of the above notice, together with copies of petition for appeal and assignments of error is hereby acknowledged and accepted this 14th day of October, 1924.

Joseph W. Howell, Solicitor for Plaintiffs, 419 Palace Bldg., Tulsa, Okla.

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Oct. 15, 1924

Comes now, on this 13th day of October, A. D., 1924, the Defendant, Charles C. Childers, State Auditor of the State of Oklahoma, by his solicitors George F. Short, Attorney General of the State of Oklahoma and Clifford W. King and Leon S. Hirsh, Assistant Attorneys General of the State of Oklahoma, and together with the Petition for Appeal filed herewith, respectfully shows that the final

decree made and entered in this cause on the 19th day of July, 1924, is erroneous and unjust to said Defendant, assigning as such error, the following:

I

That in determining the said cause it became necessary to construe the Constitution of the United States in connection with the laws of the State of Oklahoma with reference to the alleged contravention of the latter and of the former. The Inheritance Tax Law [fol. 32] of the State of Oklahoma being the Act of the Oklahoma Legislature approved March 15, 1915, (Session Laws 1915, page 215) as amended by Act approved March 25th, 1919, (Session Laws, 1919, page 429) provided no exception from the operation of its terms in favor of the estates of Indians whose realty was restricted by acts of Congress. This involved the question of the construction and application of the second paragraph of Article VI of the Constitution of the United States, providing that the laws made in pursuance of said Constitution and treaties made under its authority should be the supreme law of the land and binding upon the Courts. The final decree herein effectively held that the Inheritance Tax Laws, insofar as they assumed to affect the estates of Indians whose realty was restricted by acts of Congress were in contravention of this clause of the Constitution; but Defendant respectfully shows that said clause of the Constitution is without application and is not contravened by the aforesaid Inheritance Tax Laws for the reason that members of the Quapaw Indian Tribe regardless of restriction are citizens in every respect of the State of Oklahoma, and for the further reason that the devolution of the estate of a decedent citizen of the State of Oklahoma is not restricted against control or taxation, by said State by any provision of the Constitution of the United States or by any law of the United States made in pursuance thereof.

II

The said final decree likewise effectively held that said Inheritance Tax Laws, insofar as they affected the estates of Indians whose realty [fol. 33] was restricted by acts of Congress was in contravention of Article I, Section 8, paragraph 3 of the Constitution of the United States granting to Congress alone the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"; but Defendant respectfully shows that said clause of the Constitution is without application and is not violated by said Inheritance Tax Laws for the reason that the members of the Quapaw Tribe of Indians are citizens in every respect of the State of Oklahoma, regardless of the extent of the restrictions upon their real property and for the further reason that the power to legislate in regard to the citizens of a sovereign State or to the devolution of the estates of citizen decedents has never been delegated to the Federal Government by the several States but is reserved to the States by virtue of Amendment X of the Federal Constitution.

III

Said decree expressly based its conclusion upon the Oklahoma Enabling Act, being Act of Congress of June 16th, 1906, Chapter 3335, (34 Stat. at L. 267), providing in effect that the descent and distribution of Indian estates should take place under the laws of the State of Oklahoma rather than by the laws of the State of Arkansas prescribed in the Act of Congress of April 28th, 1904, Section 2 (33 Stat. at L. 573). In so doing said decree assumed the validity of an act of congress providing the methods of descent and distribution of the estates of citizens of a sovereign State; the validity of such act insofar as it seeks to extend the power of Congress or the Federal Government through the Interior Department to include the right to direct the descent or distribution of the estates of citizen decedents [fol. 34] of the State of Oklahoma was questioned and denied by Defendant in his Answer and during the trial. Defendant now respectfully shows that the decree is prejudicially erroneous in holding that Congress in the said acts of 1904 and 1906 could supersede the jurisdiction of the State of Oklahoma subsequent to statehood of said State without specific delegation in the Constitution of the United States and in violation of Amendment X thereof.

IV

Said decree effectively construes the provisions of the Act of Congress of March 2nd, 1895, (28 Stat. at L. 907), as validly limiting the power of the State of Oklahoma in regard to the estates of Indian citizen decedents subsequent to statehood, (November 16, 1907); and likewise effectively construes the Act of Congress of March 3rd, 1921, (41 Stat. at L. 1225, 1248) as limiting the power of the State of Oklahoma in regard to the devolution of estates of its citizens insofar as the same related to Indians of a certain class. The said Acts place restrictions upon alienation of allotted Quapaw Indian lands; but Defendant respectfully shows that, as urged in his pleadings herein, the Constitution of the United States fails to delegate to Congress, or to the Federal Government, any power with regard to devolution of decedents' estates and that, therefore, insofar as the said Acts of 1895 and 1921 conflict with and place a burden upon the exercise of such power by the State of Oklahoma, the said Acts are in contravention of Amendment X of the Federal Constitution and void.

V

Said decree, in effect, sustains the contention of Plaintiffs, as alleged in their bill of complaint, that the State of Oklahoma has no [fol. 35] authority over the devolution of the estates of deceased Quapaw Indians, but such power is invested in the Secretary of the Interior by virtue of Act of Congress of June 25th, 1910, (36 Stat. at L. 855) and statutes supplemental thereto inasmuch as the admission of such control would be tantamount to the admission of the

right to levy excise upon such devolution. Defendants show, however, that said act of 1910, insofar as it purports to extend to the removal of such power from the State of Oklahoma and the vesting thereof in the Federal Government is invalid and inoperative for the reasons set forth in the next preceding assignment of error.

VI

And Defendant further shows that the decree is erroneous in denying the right of the State of Oklahoma to the exercise of sole and exclusive jurisdiction over the devolution of estates of decedent citizens of said State irrespective of race, together with the right as expressed by said Inheritance Tax Laws of 1915 and 1919, to levy excise upon such devolution since the said right is reserved to the said State by Amendment X of the Federal Constitution and recognized by Congress in the Act of June 16th, 1906 (36 Stat. at L. 267, Chap. 3335), following the Act of April 28th, 1904, (37 Stat. at L. 573, Chap. 1824, Sec. 2) which said acts operated to surrender to the new State of Oklahoma upon admission into the Union full control over the devolution and probate of the estates of citizen decedents regardless of race.

VII

The said decree conclusively determines that the State of Okla- [fol. 36] homa cannot levy an inheritance tax upon the devolution of a citizen decedent's estate partially composed of property to which an exemption from taxation has been affixed by Federal statute; but it is respectfully shows that said decree fails to designate between a tax upon the property and an excise upon the devolution. The latter right not being the subject of any express exemption by congressional legislation or authorities, in so failing to designate said subjects the decree has erroneously and prejudicially denied to the State of Oklahoma a right and power impliedly existent in it as a sovereign State and thereby abrogated a portion of those attributes of sovereignty guaranteed to each of the several States by reason of the fundamental theory and nature of the American dual-sovereignty system.

VIII

Said decree construes and applies the Constitution of the United States in holding that said Constitution grants to the Congress of the United States exclusive power and jurisdiction of the Indian citizens of Oklahoma and their property. But Defendant assigns that such construction and application is without warrant in the terms or import of said Constitution and that Congress is without authority to remove from the taxable or other governmental control of the State the persons or rights, privileges or property of such citizens except in the furtherance of a strictly governmental purpose either expressly or impliedly authorized by the Constitution of the United States.

Wherefore, defendant prays that said decree be reversed and the District Court be directed to vacate the injunction granted therein, [fols. 37 & 38] to dismiss the bill and to send the defendant hence with his costs herein expended.

C. C. Childers, State Auditor of the State of Oklahoma, Defendant, by George F. Short, Attorney General of the State of Oklahoma; Clifford W. King, Leon S. Hirsh, Assistant Attorneys General of the State of Oklahoma, his Solicitors.

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed Oct. 15, 1924

To the Honorable F. E. Kennamer, Judge of the District Court of the United States within and for the Eastern District of the State of Oklahoma, in the City of Ardmore, within said District:

The above named Defendant, Charles C. Childers, State Auditor of the State of Oklahoma, feeling himself aggrieved by the final decree made and entered in this cause, on the 19th day of July, A. D., 1924, does hereby appeal from said final decree so made and entered to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith; and he prays that the appeal be allowed and that citation issue as provided by law and that a transcript of the record proceedings and papers upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States.

And your petitioner further prays that the proper order, touching [fol. 40] the security to be required of him to perfect his appeal, be made.

Dated this the 13th day of October, A. D., 1924.

C. C. Childers, State Auditor of the State of Oklahoma, Defendant, by George F. Short, Attorney General of the State of Okla.; Clifford W. King, Leon S. Hirsh, Assistant Attorneys General of the State of Oklahoma, His Solicitors.

Allowance of Appeal

The foregoing Petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of Five Hundred Dollars.

Done at the City of Ardmore within the Eastern District of the State of Oklahoma, this 15th day of October, A. D., 1924.

F. E. Kennamer, Judge of the District Court of the United States within and for the Eastern District of the State of Oklahoma.

[File endorsement omitted.]

[fols. 41–44] Bond on Appeal for $1,000—Approved and filed Nov. 5, 1924; omitted in printing

---

[fol. 45] In United States District Court

[Title omitted]

Stipulation re Transcript of Record—Filed Nov. 5, 1924

In the above entitled case it is hereby stipulated by and between the solicitors for the respective parties that if an appeal be taken herein, the clerk, in making a transcript of the record, may omit therefrom all of the papers and records other than those hereinafter set forth and shall incorporate in said transcript only the following, and no other, papers or records, to-wit:

1. Amended Bill of Complaint,
2. Answer to Amended Bill of Complaint,
3. Stipulation,
4. Opinion of the Court,

[fol. 46] 5. Journal Entry,

6. Petition for Appeal,
7. Assignment of Errors,
8. Order Allowing Appeal,
9. Stipulation for Transcript,
10. Citation.

And it is further stipulated that order may be entered if the same to the court shall seem proper in accordance with this stipulation.

Dated this 29th day of October, 1924.

George F. Short, Attorney General of Oklahoma; C. W. King, Assistant Attorney General of Oklahoma; Leon S. Hirsh, Assistant Attorney General of Oklahoma, Solicitors for Defendant, Charles C. Childers, State Auditor of Oklahoma. Joseph W. Howell, Solicitor for Plaintiffs, John Beaver and Benjamin Quapaw.

[File endorsement omitted.]

[fol. 47] In United States District Court

Clerk's Certificate

United States of America,
Eastern District of Oklahoma, ss:

I, W. V. McClure, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of

the record in the case of John Beaver and Benjamin Quapaw, Plaintiffs vs. C. C. Childers, State Auditor of the State of Oklahoma, Defendant, No. 3003, Equity, as was ordered by stipulation of counsel herein to be prepared and authenticated as the same appears from the records in my office.

I do further certify that the original Citation, with service endorsed thereon, is hereto attached and herewith returned.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court at my office, in the City of Muskogee, Oklahoma, this 10th day of November, A. D. 1924.

W. V. McClure, Clerk, by Lacy Grimes, Deputy. (Seal of the United States District Court, Eastern District of Oklahoma.)

Endorsed on cover: File No. 30,691. E. Oklahoma D. C. U. S. Term No. 202. Charles C. Childers, State auditor of the State of Oklahoma, appellant, vs. John Beaver and Benjamin Quapaw. Filed November 14, 1924. File No. 30,691.

Supreme Court, U. S.
FILED
FEB 20 1928
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 202

CHARLES C. CHILDERS, State Auditor of the State of Oklahoma, *Appellant*,

vs.

JOHN BEAVER AND BENJAMIN QUAPAW, *Appellees.*

BRIEF OF APPELLANT.

An inheritance tax being a tax upon the devolution of property, and the devolution of all property of citizens of a state taking place solely by virtue of the laws of the State, the latter may collect an inheritance tax upon the devolution of the estates of its Quapaw Indian citizens.

GEORGE F. SHORT,
Attorney General of Oklahoma,

J. BERRY KING and
LEON S. HIRSH,
Assistant Attorneys General of Oklahoma,
For the Appellant.

C. H. NICHOLAS, Inheritance Tax Attorney,
State Auditor's Office, of Counsel.

Printed at Harlow Brief Printing Co., 324½ N. Broadway, Oklahoma City, Okla.

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Supreme Court of the United States

OCTOBER TERM, 1925.

No. 202

CHARLES C. CHILDERS, State Auditor of the State of Oklahoma, *Appellant*,

vs.

JOHN BEAVER AND BENJAMIN QUAPAW, *Appellees.*

BRIEF OF APPELLANT.

This is an appeal from a decree of the District Court of the United States for the Eastern District of Oklahoma (300 Fed. 113), enjoining the appellant, the State Auditor of the State of Oklahoma, from proceeding to the collection of the state inheritance tax upon the devolution of the estate of a full-blood Quapaw Indian citizen and resident of the state (R. 9-13). Appeal is taken direct to this Court under Section 238 of the Judicial Code, the cause involving the construction and application of the Constitution of the United States, the constitutionality of statutes of the United States and the claim that the inheritance tax law of the State of Oklahoma, insofar as it applies to Quapaw Indians, is in contravention of the Constitution of the United States.

ASSIGNMENT OF ERRORS.

I.

The District Court erred in failing to discriminate between an excise upon the transfer of property upon death and a tax upon the property itself.

II.

The District Court erred in effectively holding that, under Constitution, Article I, Section 8, paragraph 3, and Article VI, paragraph 2, and the implications therefrom, the Oklahoma inheritance tax law was not constitutionally applicable to the devolution of the estates of Quapaw Indian citizens of said state.

III.

The District Court erred in construing the Oklahoma Enabling Act (Act Cong. June 16, 1906; 34 Stat. 267, ch. 3335), and the Act of Congress of April 28, 1904, Section 2 (33 Stat. 573), as validly continuing the authority of the Federal government in the direction of the descent and distribution of the estates of deceased citizens of the State of Oklahoma after the erection of said state.

IV.

The District Court erred in construing the Act of Congress of March 2, 1895 (28 Stat. 907), and of March 3, 1921 (41 Stat. 1225), as validly limiting the authority

and sovereignty of the State of Oklahoma in regard to the direction of the devolution of the estates of its citizens who die after the erection of the state.

V.

The District Court erred in construing the Oklahoma Enabling Act and the Act of Congress of April 28, 1904, as not surrendering to the State of Oklahoma full sovereignty over the devolution and probate of the estates of citizen decedents.

VI.

The District Court erred in effectively holding that the State of Oklahoma has no authority over the devolution and probate of the estates of deceased Quapaw Indian citizens of said state, but that such power is properly invested in the Secretary of the Interior under the provisions of Act of Congress of June 25, 1910 (36 Stat. 855).

VII.

The District Court erred in holding all of the foregoing acts of Congress to be constitutional and valid, and not in contravention of the Federal Constitution, Amendment X, insofar as said acts seek to confer upon the Secretary of the Interior, without express constitutional grant, authority over the devolution of the estates of deceased citizens of the State of Oklahoma.

STATEMENT.

This is an action for an injunction to restrain the collection and enforcement of an inheritance tax against appellees by reason of their inheritance of the estate of one See-Sah Quapaw, a portion of which is a restricted Quapaw Indian allotment located in Ottawa County, Oklahoma.

John Beaver and Benjamin Quapaw are full-blood Quapaw Indians and inherited the estate of See-Sah Quapaw, their wife and sister, respectively, upon the date of her death, to wit: March 4, 1920. The lands which were inherited were patented on or about September 26, 1896, and, by virtue of the Act of March 2, 1895 (28 Stat. 907, ch. 188), same were inalienable for a period of twenty-five years from and after the date of patent.

By virtue of the provisions of the Act of Congress, June 25, 1910 (36 Stat. 855), and supplementary statutes, the Secretary of the Interior determined the heirs of See-Sah Quapaw in accordance with the laws of descent of intestate estates in force in the State of Oklahoma, and the Superintendent of the Quapaw Indian Agency, as administrator, now holds the lands in trust for the benefit of the appellees.

The State of Oklahoma seeks to exact the inherit-

ance or succession tax provided by law to be collected uniformly from all estates whereby devolution takes place under the laws of the state relating to succession *post mortem*. This action was instituted by appellees in an attempt to enjoin the collection of the tax from them, and thereby exempt them from the payment of a like tax to that paid by other persons who receive decedents' estates under the state law.

Section 9891, Compiled Oklahoma Statutes 1921, provides that:

> "A tax is hereby laid upon the transfer to persons or corporations of property or any interest therein or income therefrom:
>
> "First: By will or the intestate laws of this state.
>
> "Second: By deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.
>
> "Third: When the transferee becomes beneficially entitled in possession or expectancy by any such transfer whether made before or after the passage of this act. Said tax shall be upon the clear market value of such property."

Section 9896, id., then prescribes the rate of tax, graduating same upon the degree of consanguinity of the deceased and the person receiving the estate. This apportionment is designed specifically to apply to, and

to operate in harmony with, the laws of descent and distribution of the state.

Section 9898, id., prescribes that:

"Every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is so transferred, and the administrators, executors and trustees of every estate so transferred, shall be personally liable for such tax until its payment."

Section 9900, id., provides:

"Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will entitle him to pay such taxes in the same manner as he might be entitled by law to do for the payment of the debts of the decedent. Any such administrator, executor or trustee having charge or in trust any legacy for the distribution, subject to such tax, shall deduct the tax therefrom, and shall pay over the same to the state auditor. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value from the person entitled thereto. He shall not deliver, or be compelled to deliver, any specific legacy or property, subject to the tax under this act, to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisees shall deduct such tax therefrom and pay it to the administrator, executor or trustees, and the tax shall remain a lien or charge upon such real property until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy

might be enforced or in the manner hereinafter provided."

Appellees claim that these statutes are in conflict with the laws of the United States; that their estate is leased by the Secretary of the Interior and the income therefrom held in trust for their benefit, and that neither the lands nor the income should be held chargeable for the succession tax aforementioned.

Defendant George F. Short, Attorney General of the State of Oklahoma, was released as a party, by stipulation, and plaintiffs' bill was amended so as to state an alleged cause of action and pray relief solely against C. C. Childers, State Auditor of the State of Oklahoma. The latter answered by raising legal questions only. He admitted all the allegations of ultimate fact, but denied that the appellees were exempt from the uniform operation of the laws of the State of Oklahoma.

It appears from the inheritance tax report, sworn to by O. K. Chandler, Superintendent of the Quapaw Agency and administrator of the estate of See-Sah Quapaw, that the deceased left real estate valued at $215,300.00, and that there was, at the time of See-Sah Quapaw's death, money on hand, belonging to the estate, in the sum of $11,879.44. This estate, being divided ac-

cording to the laws of the State of Oklahoma, would descend in equal parts to the appellees; and, if taxable, the amount due would be computed as follows:

Total value of estate		$226,529.44
To Benjamin Quapaw, husband		113,264.72
From 1st $25,000.00 deduct $5000 exempt, taxed at 1 per cent		200.00
Second $25,000.00 taxed at 2 per cent		500.00
Second $50,000.00 taxed at 3 per cent		1,500.00
The $13,264.72 in excess of $100,000.00 taxed at 4 per cent		530.58
Total tax against husband amounts to	$	2,730.58
To John Beaver, brother		$113,264.72
From first $25,000.00 deduct $1,000 exempt, taxed at 1 per cent		240.00
Second $25,000.00 taxed at 3 per cent		750.00
Second $50,000.00 taxed at 4 per cent		2,000.00
The $13,264.72 in excess of $100,000.00 taxed at 5 per cent		663.23
Total tax against brother amounts to	$	3,653.23

Inasmuch as there was $11,879.44 cash on hand, of which each Appellee has an interest taxed to the extent of $5,939.72, it may be seen that payment of the inheritance tax can readily be made from such money, leaving a large portion of that, as well as the land, untouched.

The action now before this Court involves only one question for determination, namely: Does the inheri-

tance tax law of the State of Oklahoma extend to the taxation of the devolution of the estate of a Quapaw Indian where a portion of the property comprising such estate was, and is, restricted against alienation?

BRIEF AND ARGUMENT.

I.

The inheritance tax of the State of Oklahoma is a tax upon the transitus of the property, an excise or duty levied upon the privilege of taking property under the state law of succession, and same is not a tax upon the property itself.

It is admitted, before commencing our argument, that by the provisions of Act of Congress, March 2, 1895 (28 Stat. 876, 907), the lands of See-Sah Quapaw were inalienable at the time of her death, and that they are now held in trust by the Secretary of the Interior for the benefit of her heirs. However, appellant contends that this fact does not operate to prevent the application of the inheritance tax laws, inasmuch as the tax therein provided is upon the transitus and privilege of casting descent under the laws of the State of Oklahoma.

It has been held, in numerous cases, by this Court, that the interpretation placed upon a state statute by

the highest court of the state is conclusive upon the Federal courts.

Winchester v. *Winchester Water Works*, 251 U. S. 192, 64 L. ed. 221.
La Tourette v. *McMaster*, 248 U. S. 465, 63 L. ed. 362.
Orr v. *Allen*, 248 U. S. 35, 63 L. ed. 109.

And in the case of *Carter* v. *Whitson*, 88 Okla. 197, 212 Pac. 752, Kennamer, J., speaking for the Oklahoma Supreme Court, held:

> "The inheritance tax provided for by Chapter 162 of Session Laws 1915, is clearly a tax or duty upon the right or privilege of taking property by will or under the law governing the devolution of the estate. *Booth's Executor* v. *Commonwealth*, 130 Ky. 88, 113 S. W. 61, 33 L. R. A. (N. S.) 592.
>
> "The Supreme Court of the State of Pennsylvania in the case of *Strode* v. *Commonwealth* and *Clymer* v. *Commonwealth*, reported in 52 Pa. 181, and which decisions were afterward sustained by the Supreme Court of the United States (*U. S.* v. *Perkins*, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. ed. 287), very pertinently says:
>
> "'I repeat, therefore, as the right to take by succession and testament is derived from the state, it must necessarily be enjoyed subject to such conditions as the state may impose. And if a condition be that the kindred or legatees shall pay a bonus, this is not a tax or burden imposed on their property, or on the property of anybody else. It is simply the price of the privilege which the state has conferred upon them. If they do not choose to avail themselves of the privilege, they need not pay the price, and are no worse off than before.'

> "In *Minot* v. *Winthrop*, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259, and *State* v. *Alston*, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178, the courts of each state declared that a reasonable excise tax on the transmission of decedents' property is not in violation of the owner's right of transmission as a necessary incident of property."

In the case of *State* v. *Hamlin*, 86 Me. 495, 30 Atl. 76, 25 L. R. A. 632, 41 Am. St. Rep. 569, a statute practically identical with that of Oklahoma was attacked upon the ground that it was unconstitutional because it did not comply with the Constitution of that state, which required all taxes assessed upon personal and real property to be apportioned and assessed equally according to the just value thereof. The court, in that case, said:

> "The tax provided for in the statute under consideration is entirely an excise tax. *The whole tenor and scope of the act is one of excise and not a tax upon property.* It is not laid according to any rule or proportion, but is laid upon the interest specified in the act without reference to the whole amount required to be raised for public purposes. It is true that the act contains some language indicating a tax upon property, but it should be construed according to its essential principles, object and effect. Substance, and not form or phrase, is the important thing" (emphasis supplied).

The case of *Booth's Executor* v. *Commonwealth*, cited by Mr. Justice Kennamer in his opinion, is one of the leading American cases on the subject. Stating the nature of the tax, Mr. Chief Justice Settle said:

"The tax under this statute is, once for all, an excise or duty upon the right or privilege of taking property by will or descent under the law of the state. It is uniform in its rate as to the entire class of collaterals and strangers. * * * The Constitution guarantees to the citizens the right of acquiring, possessing and protecting the property, which includes also the right of disposal. But the guaranty ceases to operate at the death of the possessor. *There is no provision of our constitution, or that of the United States, which secures the right of any one to contract or dispose of his property after his death, nor the right to any one, whether kindred or not, to take by inheritance.* Descent is a creature of statute, and not a natural right. 2 Bl. Com., pp. 10-13: *Strode* v. *Com.*, 52 Pa. 181. * * *

"It is, however, insisted by appellant that, as the tax is a certain per centum of the value of the estate, and the property pays it, it is therefore a tax on the property itself. This argument is answered by the opinion in *Eyre* v. *Jacob*, 14 Gratt. 422, 73 Am. Dec. 367, as follows: 'But this is by no means a necessary logical conclusion. The intention of the legislature was plainly to tax the transmission of property by devise or descent to collateral kindred, and to require that a party thus taking the benefit of a civil right secured to him under the law should pay a certain premium for its enjoyment; and, as it was thought just and reasonable that the amount of the premium should bear a certain proportion to the value of the subject enjoyed, it is fixed at a certain per centum upon the value of the whole estate transmitted.' * * *" (Emphasis supplied).

Turning then to the contention so closely related to the case at bar, the learned justice continued:

Jones v Jones 234/615—

> "*It is further contended by appellant that the effect of the act is to tax property otherwise exempt from taxation;* and, as an instance in point, it is said that, a religious institution of learning receiving a devise is sought to be taxed thereon, although its property is by law exempt from taxation. *The answer to this complaint must be a restatement of the proposition that the tax is not imposed upon the property, but on the right of succession.* Bonds of the United States are by act of Congress exempt from taxation; but in the cases of *Plummer* v. *Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. 829, and *Wallace* v. *Myers* (C. C.), 4 L. R. A. 171, 38 Fed. 184, a state inheritance tax upon legacies of such bonds was sustained upon the principle above stated" (emphasis supplied).

As suggested by the Kentucky court, the Federal Supreme Court has accepted the prevailing reasoning pronounced in the Booth case. Mr. Justice McKenna, in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. ed. 1037, after reviewing the history of succession taxes from the Roman law to the date of that decision, and after citing, with approval, numerous authorities, said:

> "It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right — a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that

the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

See, also, *United States* v. *Fox*, 94 U. S. 315, 24 L. ed. 192.

II.

Members of the Quapaw Tribe of Indians, residing within the State of Oklahoma, are citizens of the said state, and, as such, their rights to transfer and receive property after death has its inception in, and is regulated by the laws of the State of Oklahoma governing decedents' estates.

The nature of the inheritance tax having been established as a duty imposed by the jurisdiction governing the descent and transmission of decedents' estates, our next contention is that See-Sah Quapaw exercises her right to transmit property at death, and appellees acquire their right to receive property by devolution, solely by grace of the laws of the State of Oklahoma.

Allotment of Quapaw lands were made under Act Cong. March 2nd, 1895 (28 Stat. 907, ch. 188), but no provision was made in that act for the mode of descent of decedent estates. Mr. Bledsoe, in his work, "Indian Land Laws" (2nd ed.), Section 263, states that it was uniformly recognized, by the attorneys of the district,

that the law of the forum, to wit, the Arkansas statute of descent in force in Indian Territory, subsequent to May 2nd, 1890, was controlling.

By the Act Cong. April 28, 1904 (33 Stat. 573, ch. 1824), the laws of descent of the State of Arkansas were specifically "extended in their operation, so as to embrace all persons and estates" in Indian Territory, "whether Indian, freedmen or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen or otherwise."

Appellees alleged in their bill that they are citizens of Ottawa County, State of Oklahoma, and hence discussion of this proposition may be briefly dispensed with. Reference need only be made to Section 2 of the Enabling Act (Act Cong. June 16, 1906; 34 Stat. 267, ch. 3335), to Section 3 of the same act, and to the fact that the terms of the act were accepted. These factors operated to confer state citizenship upon the Quapaws.

Minor v. *Happersett*, 21 Wall. 162, 22 L. ed. 627.
Boyd v. *Nebraska*, 143 U. S. 175, 36 L. ed. 103.
Bolln v. *Nebraska*, 176 U. S. 83, 44 L. ed. 382.
Heckman v. *United States*, 224 U. S. 413, 56 L. ed. 820.

By the act of April 28th, 1904, *supra*, and by virtue of the plenary authority of Congress over unadmitted territories, the law of descent of the State of Arkansas was placed in force in the Quapaw district, and full probate jurisdiction was conferred upon the Federal territorial courts. However, by the Enabling Act, the Arkansas law was superseded and the courts of Oklahoma succeeded to the jurisdiction over Indian estates. That the admission of Oklahoma substituted the Oklahoma law for that of Arkansas has not been seriously questioned since the decision in the case of *Jefferson* v. *Fink*, 247 U. S. 288, 62 L. ed. 1117.

Mr. Justice Van Devanter, in that decision, stated:

> "In determining who inherited the land the courts below applied the Oklahoma law of descent existing at the time of the allottee's death (53 Okla. 272, 155 Pac. 852); and the question for decision here is whether, under legislation of Congress, an Arkansas law, theretofore put in force in the Indian Territory, should have been applied. * * *
>
> "A territorial government never was established in the Indian Territory and it never had a territorial legislature. Apart from the tribal laws relating to descent and distribution, the only laws which became operative there were such as Congress enacted or put in force. * * *
>
> "The allotment in question was made and the tribal deeds issued shortly after the Act of 1902 (Supplemental Creek Agreement), became effective. And this was followed by the Act of April 28, 1904,

chap. 1824, 33 Stat. at L. 573, Sec. 2, declaring that all statutes of Arkansas theretofore put in force in the Indian Territory should be taken 'to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise.'

"Referring to the purpose with which the Arkansas statutes were put in force in that territory and their status there, this court said in *Shulthis* v. *McDougal*, 225 U. S. 561, 571, 56 L. ed. 1205, 1211, 32 Sup. Ct. Rep. 704:

" 'Congress was then contemplating the early inclusion of that territory in a new state, and the purpose of those acts was to provide, for the time being, a body of laws adapted to the needs of the locality and its people in respect of matters of local or domestic concern. There being no local legislature, Congress alone could act. *Plainly, its action was intended to be merely provisional.*'

"By the Enabling Act of June 16, 1906, chap. 3335, 34 Stat. at L. 267, provision was made for admitting into the Union both the territory of Oklahoma and the Indian Territory as the State of Oklahoma. Each territory had a distinct body of local laws. Those in the Indian Territory, as we have seen, had been put in force there by Congress. Those in the territory of Oklahoma had been enacted by the territorial legislature. Deeming it better that the new State should come into the Union with a body of laws applying with practical uniformity throughout the State, Congress provided in the Enabling Act (Sec. 13) that 'the laws in force in the *territory of Oklahoma*, as far as applicable, shall *extend over and apply to said State* until changed by the legislature thereof;' and also (Sec. 21) that 'all laws in force in the *territory of Oklahoma* at the time of the admission of said State

into the Union shall be in force *throughout the State*, except as modified or changed by this Act or by the Constitution of the State.' The people of the State, taking the same view, provided in their Constitution (Art. 25, Sec. 2) that 'all laws in force in the *territory of Oklahoma* at the time of the admission of the State into the Union, which are not repugnant to this Constitution and which are not locally inapplicable, shall be *extended to and remain in force in the State of Oklahoma* until they expire by their own limitation or are altered or repealed by law.'

"The State was admitted into the Union November 16th, 1907, and thereupon the laws of the territory of Oklahoma, relating to descent and distribution (Okla. Rev. Stat. 1903, Chap. 86, Art. 4) became the laws of the State" (emphasis supplied).

The learned justice continued:

"Thereafter Congress, by the Act of May 27th, 1908, Chap. 199, 35 Stat. at L. 312, Sec. 9, *recognized and treated* 'the laws of descent and distribution of the State of Oklahoma' as applicable to the lands allotted to members of the Five Civilized Tribes" (emphasis supplied).

It should be noted that the phrase "recognized and treated" was used rather than the phrase "established and put in force." Such was the full import of the decision, for, after a short further discussion, the decision states:

"We have seen that Congress was accustomed to subjecting allotted Indian lands to the local

laws of descent, and also that its action in putting the Arkansas law in force in the Indian Territory was intended to be merely provisional. With this in mind it seems very plain that the provisions before quoted from the Enabling Act were intended to result, at the time of admission of the new State, in the substitution of the Oklahoma law of descent for that of Arkansas, theretofore put in force in the Indian Territory. The recognition given to the Oklahoma law by Congress in the Act of 1908 hardly can be explained on any other theory."

The Court intimated in the closing paragraph of the opinion that the two provisos to Section 6 of the Creek Supplemental Agreement (Act Cong. June 30, 1902, ch. 1323, 32 Stat. at L. 500) would still control as a limitation upon the Oklahoma law of descent; but Mr. Justice Kennamer, of the Oklahoma Supreme Court, in the case of *In re Pigeon's Estate*, 81 Okla. 180, 198 Pac. 309, later affirmed by this Court, conclusively destroyed this conception of any Federal control over devolution of the estates of citizens of this State. This decision approved all that portion of *Jefferson* v. *Fink*, above quoted, and held that the laws of descent and distribution of the State of Oklahoma governed absolutely in the devolution of the estates of deceased allottees. Quoting:

"And as a rule of statutory construction, uniformly adhered to by the courts, is that every statute is to be construed with reference to its intended Scope and the purpose of the Legislature in enact-

ing it, and there is no reason to doubt that the Congress in extending the laws of the territory of Oklahoma in force in the State intended for the same to apply to that class of citizens that Congress was vested with power to legislate for within the State, in order that the citizens of the new State would be provided with a system, as nearly as possible, of uniform laws, * * * .

"For a number of years Congress had evidenced an intention of preparing the members of the different tribes for full citizenship and the benefits of a new order of things. So we conclude that Congress intended by extending the laws of the territory of Oklahoma in force throughout the State that said laws were to be applicable to Indians and their estates, and *that since the admission of Oklahoma as a State into the Union that the devolution of the estates of deceased allottees of the different tribes of Indians are governed by the laws of the State of Oklahoma*" (emphasis supplied).

Both of these strong decisions establish the ascendency of the Oklahoma law of descent and the fact that devolution takes place by virtue of that law.

See, also:

Teague v. *Smith*, 85 Okla. 12, 204 Pac. 439.
Harrison v. *Harrison*, 87 Okla. 91, 209 Pac. 737.
Graves v. *Jacobs*, 92 Okla. 62, 217 Pac. 871.

This brings us, then, to the broader contention—the next in line of progress, beginning with *Washington* v. *Miller*, 235 U. S. 422, 59 L. ed. 295, proceeding in regular development through the rule of *Jefferson* v.

Fink, *supra*, and then the Pigeon case, *supra*. These cases form the foundation for the next step in progressive reasoning, namely, that *the Federal Government is without authority to control the devolution of estates in Oklahoma.*

Nowhere, in the Federal Constitution, is there any wording which could be construed to authorize the passage of a law governing the devolution of estates of decedents in an admitted State. Though the power of Congress, over territories, is plenary, it is elementary that all acts designed for territorial purposes became inoperative, *ipso facto*, as Federal legislation, upon the admission of Oklahoma into the Union, regardless of the provisions of the Enabling Act.

In the early case of *United States* v. *Harris*, 106 U. S. 629, 27 L. ed. 290, this Court clearly stated that the government of the United States, different from that of the sovereign states, is a government of delegated, limited and enumerated powers and that Congress might not lawfully act except by virtue of some express or implied constitutional warrant. To the same effect was *McCulloch* v. *Maryland*, 4 Wheat. 316, 428, and *Grafton* v. *United States*, 206 U. S. 333, 51 L. ed. 1084.

In the latter case it was said:

"The government of the United States and the

governments of the several states, in the exercise of their respective powers, move on different lines. The government of the United States has no power except such as expressly or by necessary implication has been granted to it, while the several states may exert such powers as are not inconsistent with the Constitution of the United States nor with a republican form of government and which have not been surrendered by them to the general government."

These doctrines found further support in the Pipe Line case (*U. S.* v. *Ohio Oil Co.*, 234 U. S. 548, 58 L. ed. 1459), and the Child Labor case (*Hammer* v. *Dagenhart*, 247 U. S. 241, 62 L. ed. 1101), and the earlier Slaughterhouse cases (16 Wall. 36, 21 L. ed. 294).

It might be contended that Section 1 of the Oklahoma Enabling Act, specifying that the Government should have plenary authority over the Indians, operates to confer upon the Federal Government the power to exempt from State charges the property of Indians in this State. This contention, however, may be completely exploded by reference to the case of *Coyle* v. *Oklahoma*, 221 U. S. 559, 55 L. ed. 852, where, in the course of the opinion, it was said:

"The power of Congress in respect to the admission of new states is found in the third section of the fourth article of the Constitution. That provision is that 'new states may be admitted by the Congress into this Union.' The only expressed re-

striction upon this power is that no new state shall be formed within the jurisdiction of any other state, nor by the junction of two or more states, without the consent of such states, as well as of the Congress. But what is this power? It is not to admit political organizations which are less or greater or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, 'a power to admit states.' The definition of 'a state' is found in the powers possessed by the original states which adopt the Constitution—a definition emphasized by the terms employed in all subsequent acts of Congress admitting new states into the Union. The first two states admitted into the Union were the states of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. Each act declares that the state is admitted as 'a new and entire member of the United States of America.' 1 Stat. at L. 191, 189, chaps. 7, 4. Emphatic and significant as is the phrase admitted as 'an entire member', even stronger was the declaration upon the admission in 1796 of Tennessee (1 Stat. at L. 481, chap. 47) as the third new state, it being declared to be 'one of the United States of America, on an equal footing with the original states in all respects whatsoever,' phraseology which has ever since been substantially followed in admissions acts, *concluding with the Oklahoma act, which declares that Oklahoma shall be admitted 'on an equal footing with the original states.'*

"The power is to admit 'new states into this Union.' 'This Union' was, and is, a union of states, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not

delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the constitution alone, but in respect to new states, enlarged or restricted by the condition imposed upon new states by its own legislation admitting them into the union; and, second, that such new state might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission. * * * In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the state; second, between compacts or affirmative legislation intended to operate *in futuro*, which are within the scope of the conceded powers of Congress over the subject; and, third, compacts or affirmative legislation which operates to restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power. * * *

"The reference of Justice Catron to the terms and conditions in act of 1812 is to a provision in the act of 1811 (2 Stat. at L. pp. 641, 642, chap. 21), quite common in enabling acts, by which the new state disclaimed title to the public lands and stipulated that such lands should remain subject to the sole disposition of the United States, and for their exemption from taxation, and that its navigable water should forever remain open and free, etc. Such stipulations, as we shall see, being within the

sphere of congressional power, can derive no force from the consent of the state. *Like stipulations, as well as others in respect to the control of the United States of the large Indian reservations and Indian population of the new state, are found in the Oklahoma enabling acts. Whatever force such provisions have after the admission of the state may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution, rather than from any consent by or compact with the state.* * * * So far as the state has found occasion to advert to the effect of enabling acts as affirmative legislation affecting the power of new states after admission, there is to be found no sanction for the contention that any state may be deprived of any of the power constitutionally possessed by other states, by reason of the terms in which the acts, admitting them to the Union, have been framed. * * * *The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission*" (emphasis supplied).

In the case of *McNulty* v. *Beatty*, 10 How. 71, 13 L. ed. 335, at page 78 of the official report, it was stated:

"By the admission of the State of Wisconsin into the Union, on the 29th day of May, 1848, the territorial government ceased to exist, and all the authority under it, including the laws organizing its courts of justice, and providing for a revision of

> their judgments in this court by appeals or writs or error. This appellate power does not depend upon the Judiciary Act of 1789, but upon laws regulating the judicial proceedings of the territory. And these necessarily ceased with the termination of the territorial government."

And again in *Hawkins* v. *Bleakley*, 243 U. S. 210, 61 L. ed. 678, at page 684, this court said:

> "The regulation, although embracing provisions of the ordinance declared to be unalterable, unless by common consent, had no further force in Iowa, after its admission as a state, and the adoption of a state constitution, than other acts of Congress for the government of the territory. All were superseded by the state constitution (citing authorities). The State of Iowa, therefore, is as much at liberty as any other state to abolish or limit the right of trial by jury; or to provide for a waiver of that right as it has done by the act under consideration."

See, also, *Kansas* v. *Colorado*, 206 U. S. 95, 51 L. ed. 956.

In other words, though Congress may, and does, have some authority over the Indians, such power may not be extended by act of Congress in the form of an enabling act nor may the delegated power of Congress, under the Constitution, be increased by consent of a state. *The Federal government operating under delegated authority cannot enlarge its sovereignty or, in*

effect, amend the Federal Constitution by compact with or consent of any one state.

In the case of *United States* v. *Fox*, 94 U. S. 315, 24 L. ed. 192, it was said that "the title and modes of disposition of real property, within a state, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority," and also:

> "The power of the state to regulate the tenure of real property within her limits and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted."

We contend that the admission of Oklahoma as a state terminated all Federal laws of descent and distribution theretofore in force in Indian Territory, irrespective of the provisions of the Enabling Act; that the states are sovereign in all those particulars wherein it has not joined in the *general* delegation to the Federal government; and that inasmuch as no authority has been delegated to the latter respecting laws of descent and distribution, that power resides in the State of Oklahoma, as a sovereign state.

Pennoyer v. *Neff*, 95 U. S. 714, 24 L. ed. 665.
Munn v. *Illinois*, 94 U. S. 113, 24 L. ed. 77.
New York v. *Miln*, 11 Pet. 102, 9 L. ed. 648.
Kidd v. *Pearson*, 128 U. S. 1.
Mager v. *Grimes*, 49 U. S. 490, 12 L. ed. 1168.

And, supporting the contention heretofore advanced, that the state has the sole and exclusive power over the disposition of property under its jurisdiction, are the following cases:

McCormick v. *Sullivant*, 10 Wheat. 192, 6 L. ed. 300.
Segley v. *Car Co.*, 120 U. S. 580, 30 L. ed. 789.
United States v. *Perkins*, 163 U. S. 625, 41 L. ed. 287.
Snyder v. *Bettman*, 190 U. S. 249, 47 L. ed. 1035.
Wilcox v. *Jackson*, 13 Pet. 498, 10 L. ed. 264.
Langdon v. *Sherwood*, 124 U. S. 74, 31 L. ed. 344.
O'Callighan v. *O'Brien*, 199 U. S. 99, 50 L. ed. 101.
Ellis v. *Davis*, 109 U. S. 485, 27 L. ed. 1006.
Knowlton v. *Moore*, 178 U. S. 43, 44 L. ed. 970.
Plummer v. *Coler*, 178 U. S. 115, 44 L. ed. 998.

We are aware that both this Court and the state supreme court have deviated from this obvious division of powers doctrine in several cases, but our contention is so fundamental in its nature, dealing with the very basis of our governmental institution, that had this contention been raised in the various cases the courts would have necessarily been obliged to qualify their decisions in order to conform to the well accepted division of powers between the states and the Federal government.

That such a view is not without merit is evidenced by quite a recent case decided by this Court, it being the case of *Sunderland* v. *United States*, 266 U. S. 226, 69 L. ed. 70.

That cause arose over a sale of certain property to Sunderland by one Nathaniel Perryman, a Creek half-blood, whose homestead was allotted to him with restrictions against alienation until April 26, 1931, subject, however, to removal, wholly or in part, by the Secretary of the Interior, "under such rules and regulations concerning the terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe" (Act of Congress of May 27, 1908, 35 Stat. 312, ch. 199, Sec. 1). Upon application, the secretary removed the restrictions from a portion of the homestead, which was then sold, the proceeds of the sale being retained by the secretary. Subsequently a portion of the proceeds was used to purchase another tract of land (the subject of controversy), such purchase being authorized by the secretary, upon condition that the deed of conveyance contain a clause restricting the alienation of the land so purchased until April 26, 1931, "unless made with the consent of, and approved by, the secretary of the Interior." The deed was made accordingly and duly recorded. Perryman, thereafter, without the consent of the secretary, sold and conveyed the land to Sunderland.

The United States sought to cancel the conveyance which Sunderland vigorously resisted. In the opinion the court said:

> "The power of Congress is challenged upon the ground that the land had become subject to the jurisdiction of the state and was exclusively within the control of its laws. *The general rule is not to be doubted that the tenure, transfer, control and disposition of real property are matters which rest exclusively within the state where the property lies* (*United States* v. *Fox*, 94 U. S. 315, 321, 322, 24 L. ed. 192, 193); but it by no means follows that a restriction upon alienation, limited as it is here, may not be imposed by the United States as a condition upon which a purchase of private lands within the state will be made for an Indian ward. *The question is argued as though there had been an actual invasion, or an interference with, the authority of the state to regulate and condition the transfer of land within its boundaries. But there is no such invasion or interference.* If Congress, in fulfillment of its duty to protect the Indians, whose welfare is the peculiar concern of the Federal government, deems it proper to restrict for a limited time the right of the individual Indian to alienate land purchased for him with the funds arising from the sale of other lands originally subject to a like restriction, *we are not aware of anything which stands in the way.* THE STATE OF OKLAHOMA IS NOT CONCERNED SINCE THERE IS NO STATE STATUTE, RULE OF LAW OR POLICY, WHICH HAS BEEN CALLED TO OUR ATTENTION, TO THE CONTRARY EFFECT. IF THERE WERE, OR IF THE POWER OF STATE TAXATION WERE INVOLVED, WE SHOULD CONSIDER THE QUESTION OF SUPREMACY

OF POWER, BUT NO SUCH QUESTION IS PRESENTED BY THIS RECORD" (emphasis supplied).

This Court has recognized the proposition that the State of Oklahoma has control of the transfer of property, and in the instant case, unlike the Sunderland case, the State of Oklahoma is advancing its state statutes, the rules of policy upon which its sovereignty is founded, has put into the balance its power of state taxation and is most vehemently asserting that the "peculiar concern of the Federal government" is not so powerful as it is peculiar: *that the Federal government has no control whatever over the devolution of property in Oklahoma and cannot, by the claim of such control, defeat the sovereign power of the state to tax privileges which it alone confers.*

It has been contended that the state disclaimed, by the Enabling Act, the right to control the devolution of Quapaw Indians' estates. But in view of the authorities hereinbefore set forth it is clear that such power over its citizens is an inherent attribute of the state, one of the composites of its very existence.

Inasmuch as probate matters within a sovereign state are matters entirely beyond the delegations to the Federal Union, we submit that since statehood the descent of property of citizens of the State of Oklahoma

are subject to the laws of the state alone. Amendment X to the Federal Constitution solemnly guarantees to the sovereign states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Whatever authority the Federal government may have had over the Quapaw Indians, before statehood, or whatever control it may have over them while living, after statehood, as to the alienability of their lands, the fact remains that matters of descent of their property, involving the necessity of probate determinations, are matters solely for the state in which such Indians are domiciled as citizens; and, inasmuch as transmission and inheritance of decedents' estates, within the State of Oklahoma, are by virtue of its laws, we submit that the State of Oklahoma may collect an excise on such right, even though the decedent and the heirs be of Indian blood.

Carter v. *Whitson, supra.*
Booth's Executor v. *Commonwealth, supra.*
Magoun v. *Illinois Trust & S. Bank, supra.*
United States v. *Perkins, supra.*

III.

That the property, transmitted by decedent under the laws of descent, is exempt from taxation does not prevent the operation of the succession tax law upon the devolution of the estate.

The authorities heretofore set forth demonstrate that the devolution of an Indian's estate is subject to the succession taxes of the state, in the absence of other considerations. It therefore remains only to eliminate those considerations which are urged to defeat the general principles heretofore established.

Appellees contend that by reason of the fact that the Federal acts of 1895 restricted the estate of See-Sah Quapaw for a period of twenty-five years from and after the date of the patent, and that said restrictions were extended for an additional period of twenty-five years from March 3, 1921, by the Federal act of that date (41 Stat. 1225, 1248), such restrictions make the land non-taxable and non-chargeable with a tax lien, such as provided in Section 9898, Compiled Oklahoma Statutes 1921. Appellees further contend, upon the basis of the above premises, that they are not subject to the inheritance tax law.

A very analogous situation was presented to this Court in the case of *Plummer* v. *Coler*, *supra*. It appeared that Joseph Plummer, a citizen and resident of

the State of New York, died, devising to Harry Plummer, his executor, $40,000.00 in United States bonds. The Act of Congress, under which the bonds were issued, provided:

> "all of which several classes of bonds and the interest thereon shall be exempt from the payment of all taxes and duties of the United States, *as well as from taxation in any form by or under state, municipal or local authority*" (emphasis supplied).

The State of New York sought to collect an inheritance tax upon this legacy. Plummer asserted an exemption by reason of the Federal statute, contending that "the states have no power to impose any tax or other burden which would have the effect to prevent or hinder the government of the United States from borrowing such amounts of money as it may require for its purposes, on terms as beneficial and favorable to itself, in all respects, as it could do if no such tax were imposed by the state."

This contention of public governmental policy, supported by *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 537, is, we submit, fully as strong as any argument of governmental policy toward the Indian tribes; but, in the opinion, the court held that:

> "We think the conclusion, fairly to be drawn from the state and Federal cases is, that the right to take property by will or descent is derived from,

and regulated by, municipal (state) law; that, in assessing a tax upon such right or privilege, the state may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities does not invalidate the tax or the law under which it is imposed."

See, also:

Wallace v. *Myers*, 38 Fed. 184.
Estate of Sherman, 153 N. Y. 1, 46 N. E. 1032.
Strode v. *Commonwealth*, 52 Pac. 181.

Possibly the strongest case from this Court, yet the most frequently cited and approved, is that of *United States* v. *Perkins* (163 U. S. 625, 41 L. ed. 287), cited in *Carter* v. *Whitson, supra*, wherein the question involved was the subjection to inheritance tax of property bequeathed to the United States itself. It was, of course, conceded that the property of the United States may not be taxed; nor could the state affix a lien upon property belonging to the Federal government. Yet, Mr. Justice Brown, in the opinion of the court, quoting from *Mager* v. *Grimes*, 8 How. 490, 493, said:

"The law in question is nothing more than an exercise of the power which every state and sovereignty possess, of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will and testament, or by inheritance; and of prescribing who

shall and who shall not be capable of taking it. * * * If a state may deny the privilege altogether, it follows that when it grants it, *it may annex to the grant any conditions which it supposes to be required by its interest or policy. To the same effect is United States* v. *Fox*, 94 U. S. 315.

"We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. *The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it*" (emphasis supplied).

Hence, it may be seen that this Court recognizes that a state inheritance tax may be fixed as a prior charge, or lien, even upon property inherited by the United States. In view of such holding, appellees' contentions of exemption appear to have small foundation in authority.

However, the tax need not be collected from the real property at all. The tax is specifically made a personal debt of the recipient of the inheritance, and Section 9900, Compiled Oklahoma Statutes 1921, provides several methods by which collection may be enforced. Inasmuch as there is sufficient cash in the hands of the administrator of the decedent's estate to pay the tax, the second

method provided by Section 9900, *supra*, would be entirely proper. This portion of the statute provides:

> "Any administrator, executor or trustee *having in charge or in trust* any legacy or property for distribution, subject to such tax, shall deduct the tax therefrom, and shall pay over the same to the State Auditor" (emphasis supplied).

Though the case of *Kendall* v. *Ewert*, 259 U. S. 139, 66 L. ed. 862, is not applicable in point of fact, that case clearly expresses the views of this Court upon the matter at bar. In that case Ewert, an employee of the Quapaw Agency, purchased some land from a full-blood Quapaw named Redeagle. In a suit to recover the property for the heirs of Redeagle, upon the grounds that the transaction was void for fraud and as against public policy, it developed that Ewert had received considerable money from royalties for lead and zinc ores mined from the land.

Mr. Justice Clark rendered the opinion of the court (from which there were no dissents), said:

> "The record shows that large sums in royalties for zinc and lead ores mined from the lands involved had been paid to Ewert, and these funds accrued were clearly personal property (*United States* v. *Noble*, 237 U. S. 74, 80, 35 Sup. Ct. 532, 59 L. ed. 854), which, on the death of Redeagle, would pass to his administrator *for the purposes of paying ANY INHERITANCE or other taxes*, which might

be properly chargeable against it, and for other administration charges and for distribution. *There being no congressional legislation providing for the administration of such intestate property, the state law is applicable, and we think the administrator is a competent party to assert the right of the estate, whatever it may be, to rents or royalties derived from the land during Redeagle's lifetime*" (emphasis supplied).

IV.

Quapaw Indian estates are not such a type of Federal instrumentality as to exempt their devolution from the succession taxes of the state under whose laws the transfer takes place.

Another consideration is that argument which asserts that because the lands of the Quapaws are inalienable they are essentially in the hands of a Federal instrumentality, and that by reason of their control by the Secretary of the Interior they are exempt from every sort of tax. It may also be eliminated.

We have pointed out that the devolution of decedents' estates is not by a Federal statute, and that the Secretary of the Interior does not possess, along with the money and property he *assumes* to hold the authority under which the appellees inherit See-Sah Quapaw's property. Hence, it is not within his power, as an instrument of the Federal government, to exempt this right of inheritance (which appellees possess, regardless of him) from taxation.

There can be no question to the proposition that the power of taxation in the state does not extend to those matters which constitute Federal instrumentalities as the right of taxation in the Federal government does not extend to those matters which are instrumentalities for carrying out the governmental purposes for the state. This principle has not been questioned since the famous decision of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316; but the question arises as to whether Congress can empower the Interior Department to assume any control over Indian estates to such extent as to clothe their devolution with the character of a Federal instrumentality in such manner as to withdraw it from that class of rights upon which the state's system of taxation operates.

As has been already stated, there can be no doubt that prior to statehood the authority of Congress in the Indian country was plenary. It was said in the case of *United States* v. *Kagama*, 118 U. S. 375, 30 L. ed. 228:

> "The power of the general government over these remnants of a race, once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in the government because it never existed anyhere else; because the theatre of its exercise is within the geographical limits of the United States; because it has never been denied, and because it alone can enforce its laws on all tribes."

This is the case which is most consistently cited to sustain the claim of government control over the Indians, and it was entirely true as long as the relationship between the government and the Indians existed solely in unadmitted territories. The self-same argument justifies Federal authority over territories. But it is without any logical force when used to sustain a Federal supervision over citizens of a sovereign state. The Federal power is not necessary for the protection of the Quapaws any more than it is for naturalized Teutons or Scandinavians or Latins; the state furnishes them ample protection and has sufficient power to increase the paternal direction as it becomes necessary. That the Federal authority existed nowhere else prior to statehood, and that the theatre of its exercise is within the geographical limits of the United States are no more persuasive when applied to Indian regulation than to the regulation of any other citizen of the state. And, lastly, the state is denying the power most emphatically, asserting that it has ample ability to enforce laws generally throughout its domain, and is protesting vehemently against the encroachment upon its sovereignty by the Federal government.

The lands were allotted to the Indians while Congress had plenary authority over the territory, and Congress contracted an exemption from taxation on the

land which could not be impaired by the Enabling Act (*Choate* v. *Trapp*, 224 U. S. 665, 56 L. ed. 941). Such restriction, no doubt, confers upon the Federal government an interest in the land *during the lifetime of the allottee*, but not thereafter, because, in the absence of a delegation to Congress to pass laws of descent and distribution, the Federal government has no more right to entail lands in a sovereign state than any individual. For, as was said in the case of *Van Brockin* v. *Anderson*, 117 U. S. 151, 29 L. ed. 845:

> "The United States do not, and cannot, hold property as a monarch may for private or personal purposes. All of the property and revenues of the United States must be held for and applied as all taxes, duties, imports and assizes must be laid and collected, to pay the debts and provide for the common defense and general welfare of the United States."

We believe that we have already demonstrated that there is no governmental purpose in the authority assumed by the United States over the Indians after statehood, so we inquire by what method it is to be determined that an instrumentality may be created for a purely private or philanthropic purpose? If the United States lacks governmental supervision, and, as said in *Van Brockin* v. *Anderson, supra*, it cannot hold the title for any other purpose, by what means is an instrumentality justified?

The theory of exemption by reason of a governmental instrumentality or agency is that such agency is performing a proper governmental function of the sovereignty. But, just as the right to tax must be measured by the extent to which it could be carried (as was said in *McCulloch* v. *Maryland, supra*), so, it seems to us, the right of one sovereignty in our dual system to exempt persons or rights or property from taxtion by the other should be measured by the same rule.

The necessary conflict between the right of the states to collect revenue for state purposes and the right of the Federal government to exempt for its purposes requires that the right to exemption be recognized only in those cases where the subject matter thereof is a proper, vital and necessary governmental function, such as the holding of lands for postoffices, forts, arsenals and the like. But the power residing in the Federal government to assume control over, and withdraw from, taxation the rights or property of citizens of a state, when exercised or located within the state, must necessarily be limited.

The inverse of the instant cause arose in the case of *South Carolina* v. *United States*, 199 U. S. 437, 50 L. ed. 261. In that case the question arose as to the liability of the dispensary agent of the State of South Carolina for license taxes prescribed by the Federal

revenue laws on dealers of intoxicating liquors. The State of South Carolina, in the exercise of its sovereign power, had taken charge of the business of selling liquor in that state, and the Treasury Department of the Federal Government was attempting to collect the liquor license tax from the state's dispensary agents. In discussing the question, Mr. Justice Brewer said:

> "Among those matters which are implied, though not expressed, is that the nation may not, in the exercise of its powers, prevent a state from discharging the ordinary functions of government, just as it follows from the second clause of Article 6 of the Constitution, that no state can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it.
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> * * * * * * * * *
>
> "The right of South Carolina to control the sale of liquor by the dispensary system has been sustained, *Vance* v. *W. A. Vandercrook Co.*, 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million dollars. Mingling the thought of profit with the necessity of regulation may induce the state to take possession, in like manner, of tobacco, oleomargarine and all other objects of internal revenue tax. If one state finds it thus profitable, other states may follow and the whole body of internal revenue tax be thus stricken down.
>
> "We may go a step further. There are some insisting that the state shall become the owner of all property, and the manager of all business. Of

course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any state, how much would that state contribute to the revenue of the nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. * * * Suppose a state assumes, under its police power, the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument would exempt the sale by a state of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a state from import duty. While the state might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals, and so monopolize the importation and sale of foreign goods.

"Obviously, if the power of the state is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the states should concur in exercising their powers to the full extent it would be almost impossible for the National Government to collect any revenues. In other words, in this indirect way it would be within the competency of the state to practically destroy the efficiency of the National Government."

Further on in the opinion it is said:

"There is something of a conflict between the full power of the nation in respect to taxation and the exemption of the state from Federal taxation in respect to its property and the discharge of all its functions. Where and how shall the line be-

tween them be drawn? We have seen that the full power of collecting license taxes is in terms granted to the National Government, with only the limitations of uniformity and the public benefit. The exemption of the State's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the state in all its efficiency. In order to determine to what extent the implication will go, we must turn to the condition of things at the time the Constitution was framed. What, in the light of that condition, did the framers of that Constitution intend should be exempt? Certain it is that modern notions as to the extent to which the functions of a state may be carried had then no hold.

"Looking, therefore, at the Constitution in the light of the conditions at the time of its adoption, it is obvious that the framers, in granting full power over license taxes to the National Government meant that power should be complete, and never thought that the states, by extending their functions, could practically destroy it."

So if the states must submit to exactions upon their enterprises, it would seem that the reverse should also be true. Uniformity of holding and mutuality of relationship demands that the states be accorded the same benefits as are accorded the general government. The conflict which necessarily exists between the right of the Federal Government to tax and the right of the State to exempt, likewise exists between the right of the State to tax and the right of the Federal Government to exempt; that in the same manner as it was never contem-

plated by the framers of the Constitution of the United States that the State, by extending its functions to the entry into other than purely governmental enterprises, could defeat the general government in the collection of its revenues, so it was never contemplated by those framers of the Constitution that Congress would attempt to assume a guardianship over people of a sovereign state or any interest in them which would militate against the state's sovereign right to define the rights of transmission and inheritance of property or to levy an excise upon such rights.

In the debates of the First Congress (Annals of Congress, Vol. 1, p. 455), discussing the proposed amendments of the Federal Constitution, Mr. Madison said:

> "It is true, the powers of the general government are circumscribed, they are directed to particular objects; but even if the government keeps within those limits, it has certain discretionary powers with respect to the means, *which may admit of abuse to a certain extent,* in the same manner as the powers of the State governments under their constitutions may to an indefinite extent; because in the Constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the government of the United States, or in any department or officer thereof; this enables them to fulfill every purpose for which the Government was established.

Now, may not laws be considered necessary and proper for Congress, for it is for them to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation, which laws in themselves are neither necessary nor proper; as well as improper laws could be enacted by the State Legislature, for fulfilling the more extended objects of those governments. I will state an instance which I think in point, and proves that this might be the case. The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature; may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their contitutions the State Governments had in view? *If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government*" (emphasis ours).

It, indeed, seems that Mr. Madison's fears were well founded when one views the situation with regard to Oklahoma's Indian citizenry. And his views, together with that expressed by others bringing about the insertion of Amendment X into our Federal Constitution, are most instructive in construing the limitations which it imposes.

Speaking of "State Control of Local Taxation", Hamilton said:

"And making this concession, I affirm that (with the sole exception of duties on imports and ex-

ports) they would, under the plan of the Convention, retain that authority in the most absolute and unqualified sense; and that *an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its Constitution.* * * * Suppose, again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a land-tax imposed by the authority of a State; would it not be equally evident, that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its constitution plainly supposes to exist in the State government? * * * But it will not follow from this doctrine, that acts of the larger society, which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. *These will be merely acts of usurpation and will deserve to be treated as such.* * * * Though a law, therefore, laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controlled; *yet a law for abrogating or preventing the collection of a tax laid by the authority of the State (unless upon imports and exports) would not be the supreme law of the land but a usurpation of power not granted by the Constitution"* (emphasis supplied).

The Federalist, essay No. 31.

When the Income Tax case was before this Court for rehearing, Chief Justice Fuller, delivering the opinion for the Court, said:

"In our judgment, the construction given to the Constitution by the authors of the Federalist (the

five numbers contributed by Chief Justice Jay related to the danger from foreign force and influence, and to the treaty-making power) should not and cannot be disregarded."

Pollack v. *Farmers' Loan Co., supra.*

"The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our Constitution, and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitled it to this high rank, and the part two of its authors performed in framing the Constitution put it very much in their power to explain the view with which it was framed."

Chief Justice Marshall in *Cohens* v. *State of Virginia*, 6 Wheat. 264—Marshall's Constitutional Opinions (Dillon), 407, 408.

In the South Carolina case it was indicated that the principle governing such as the one at bar should be that the exemption of agencies of the one sovereign from the taxation of the other is limited to those instrumentalities which are strictly governmental in character, and that the exemption does not extend to those things which are not induced by an urgent governmental necessity. This same principle was the basis of the decision in the *Western Union Telegraph Company* v. *Attorney General of Massachusetts*, 125 U. S. 530, 31 L. ed. 794. From that case we quote:

"It cannot be that a state tax which remotely affects the efficient exercise of a Federal power is

for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The states are, and they must ever be, co-existant with the national government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. *Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states or prevent their efficient exercise.* * * * A very large proportion of the property within the states is employed in execution of the powers of government. It belongs to government agents and it is not only used, but it is necessary for their agencies. United States mails, troops and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service. So are steamboats, horses, stage coaches, foundaries, shipyards and multitudes of manufacturing establishments. They are the property of natural persons or of corporations, who are agents or instruments of the general government and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenues of the states, it is manifest the state governments would be paralyzed. While it is of the utmost importance that all powers vested by the Constitution of the United States in the general government should be preserved in full efficiency and while recent events have called for the unembarrassed exercise of many of those powers, it has never been decided that state taxation of such property is impliedly prohibited" (emphasis supplied).

Though the exemption of the land from taxation and the restrictions upon alienation are contractual obligations affixing themselves to the land during the lifetime of the allottee, the assumed guardianship over the funds, properties and the disposition thereof upon death can only find justification in governmental jurisdiction, a power never conferred upon the Federal government by the Constitution. Therefore, it seems sophistical to urge that such "peculiar interest" of the United States is a governmental instrumentality of sufficient necessity to justify an exemption.

It may be the policy of the Federal government to *assist the Indians in the accumulation of great wealth and perpetuating it in their respective families*, but it seems inconceivable that such a policy could possibly be construed as an authorized governmental function, defeating the general operation of the laws of the state in which such persons are domiciled as citizens.

Exemption of Federal agencies from state taxation is dependent, not upon the nature of the agent, or upon the fact that they are agents, but upon the effect of the tax—that is, whether the tax really deprives the agent of the power to serve the government or hinders the exercise of the governmental power. Either where no power exists or where no hindrance is imposed, no exemption is created.

Hence, we maintain that the management of the funds and properties for the benefit of the private gain of the Indian or his heirs should be treated in that class of activities similar to the private enterprises in which a state engages, or even in a less favorable light, since it is wholly unauthorized and destructive to the American political organization. Investments made for the purpose of increasing the value of the individual estate of Indians and privileges enjoyed, at the hands of the state, permitting perpetuation of that estate in the manner provided by the state statutes surely should be considered taxable by the Commonwealth.

CONCLUSION.

In view, therefore, of the propositions established above, it should be apparent that the devolution of the estate of See-Sah Quapaw was taxable under the laws of the state by whose grace such devolution took place: that the injunction decree of the district court was erroneously entered, and that the cause should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925

IN EQUITY NO. 202.

C. C. CHILDERS, State Auditor of the State of Oklahoma - - - - - - - Appellant

against

JOHN BEAVER and BENJAMIN QUAPAW, - - - - - - - - - - - - - Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This is an appeal from a final decree in favor of the plaintiffs (Appellees here) enjoining the State Auditor of the State of Oklahoma from collecting a State Inheritance Tax, pursuant to the opinion of the District Court of the United States for the Eastern District of Oklahoma, rendered on the 19th day of July, 1924, and reported in Volume 300 of the Federal Reporter, beginning at page 113 thereof, in the case of *Beaver* v. *Short*.

The question here presented is whether the restricted estate of a deceased Quapaw allottee, who died in the year 1920, inherited by heirs who are full-blood Quapaw Indians of the restricted class, is subject to the Inheritance Tax Law of the State of Oklahoma of March 15, 1915, comprising Chapter 162 of the Session Laws of 1915, as amended by Act of March 25, 1919, Chapter 296 of the Session Laws of Oklahoma for the year 1919.

The statement of ultimate facts, as set forth in the Amended Bill of Complaint, is accepted by both parties as correct, pursuant to a stipulation, duly executed, wherein it was agreed that the issues should be confined

> "to the sole question of whether transfers by inheritance of Indian property of the kind and under the circumstances mentioned in the bill of complaint are subject to the Inheritance Tax Laws of the State of Oklahoma, for the guidance, of both State and Federal Officers concerned in the administration of such matters".

The facts are as follows:

Se-Sah Quapaw, a full-blood Quapaw allottee, died intestate in the year 1920, leaving as her sole heirs her brother, John Beaver, and her husband, Benjamin Quapaw, the appellees herein. Her estate, as set forth in the amended bill of complaint, consisted of her own allotment, and a half interest in the allotment of a deceased child, who died in the year 1900. Both of the allotments were made inalienable for 25 years from the date of patent, pursuant to the Act of March 2, 1895, (28 Stat. 876, 907), and in each case the restrictions were continued for another period of 25 years by the Act of Congress approved March 3, 1921, (41 Stat. 1225, 1248.)

Attention is here invited to the claim of counsel for the Appellant, as set forth in their brief, that the estate of See-Sah Quapaw included a cash sum of $11,879.44 of unrestricted moneys in addition to the lands before mentioned. This statement was apparently made through inadvertence, as no reference is made to such a sum in the Stipulated Statement of facts. However, counsel for Appellees admits the existence of approximately that sum, at the death of See-Sah Quapaw, which sum was held in trust by the Superintendent of the Quapaw Agency, but is in a position to state positively that the amount so held consisted of royalties from these restricted allotments which had accrued to her credit during her life-time, and that the same was disbursed for the benefit of her heirs prior to any claim being asserted for the payment of an Inheritance Tax thereon; and, furthermore, that all sums held to the credit of the heirs at this time accumulated since her death from the same sources.

It is also necessary, to afford a correct statement of the facts, to advise the Court that no administrator has ever been appointed for the estate of See-Sah Quapaw. Three different superintendents have been in charge of the Quapaw Agency from the time of her death to the present time and none of them was ever appointed to that position. Each, in his turn, has held her lands and money in custody, as in the case of other restricted Quapaw Indians, but only in his capacity as an Officer of the United States.

With these fundamental matters before the Court, attention is invited to the points in issue.

SUMMARY OF POINTS

I.

The State Inheritance Tax Laws are repugnant to and inconsistent with the treaty stipulations and federal statutes pursuant to which the lands in question were allotted, in that such State laws infringe upon and interfere with the trusteeship of the United States and conflict with the intent of Congress that the restrictions should run, unimpaired, with the land to the end of the restricted period. (Page 6 hereof).

II.

The State Inheritance Tax laws are repugnant to and inconsistent with the Constitution of the State of Oklahoma and the Enabling Act of Congress admitting the State into the Union. (Page 19 hereof.)

III.

If any kind or class of property is itself exempt from taxation in pursuance of a governmental policy, as a Federal instrumentality, it follows, as a corollary that it cannot consistently be subjected to any indirect form of taxation such as an income, gross-production or privilege tax. (Page 25 hereof.)

IV.

Where Indian lands are unequivocally declared inalienable and are held under governmental control and supervision, the restriction is a limitation upon involuntary, as well as voluntary, alienation and renders such lands exempt from all forms of taxation. (Page 26 hereof)

V.

Exemptions in express words are not necessary to render Indian lands non-taxable if it is clearly intended

the lands are to be inalienable. (Page 28 hereof.)

VI.

The decisions cited by counsel for Appellant for the purpose of showing that State Inheritance Taxes have been upheld, notwithstanding the Government has some form of interest in the inherited property, have no controlling force in determining the validity of an inheritance tax on restricted Indian lands. (Page 29 hereof.)

VII

The decisions cited by counsel for Appellant to show that the United States has no jurisdiction of Indian lands located in new States, after the admission of such States, have no controlling force in the determination of the question before the Court. This, for the reason that there is nothing in those decisions in derogation of the power of Congress to act in matters committed to its jurisdiction by the National Constitution even though the subject matter may be located within the limits of a state. (Page 31 hereof.)

VIII.

The constitutional theory advanced by counsel for Appellant is another form of the old contention, now obsolete, that the grant of citizenship to Indians was inconsistent with restrictive Indian legislation, and it is so far-reaching and all-inclusive that one of two conclusions must follow: (1) it must be accepted as properly challenging the validity and correctness of the actions and decisions of all Departments of the National Government respecting important Indian matters in Oklahoma, beginning with the Enabling Act, or, (2) it must be rejected as fundamentally unsound. (Page 37 hereof.)

ARGUMENT

I.

The State Inheritance Tax Laws are repugnant to and inconsistent with the Treaty Stipulations and Federal Statutes pursuant to which the lands in question were allotted, in that such state laws infringe upon and interfere with the Trusteeship of the United States and conflict with the intent of Congress that the restrictions should run, unimpaired, with the land to the end of the restricted period.

While this controversy arises primarily from the attempt of the State Officers to apply the State Inheritance Tax Laws to this estate, the real question is not so much one of taxation—although that is necessarily involved—as it is to determine whether the State in making such an attempt, is encroaching upon the domain of Federal Jurisdiction and is undertaking to do that which amounts to an interference or obstruction to the administration of the laws of the United States. It is the desire of counsel for appellees to project this question prominently into the foreground, irrespective of whether the State Inheritance Tax is a tax on property, or is merely a transfer charge or, in other words, a price imposed for the privilege of inheriting, it being contended on behalf of appellees that the logical result is the same in either case, *Brown* v. *Maryland,* 12 Wheat. 419, 444, and that, regardless of the name, it would burden a Federal instrumentality. *Choctaw & Gulf R. R.* v. *Harrison,* 235 U. S. 292, 298; *McCulloch* v. *Maryland,* 4 Wheat, 316, 425; *Farmer's Bank* v. *Minn,* 232 U. S. 516.

It is further submitted on behalf of appellees that the legislation of Congress and the Laws of Oklahoma, read in the light of the pertinent decisions of the Federal and State courts, to which reference will now

be made, disclose unmistakably the existence of two separate and distinct sovereignties which function separately and apart in their respective fields, and that, in Indian affairs, the termination of the jurisdiction of the one marks the point where the authority of the other begins.

By Article 1 of the Treaty of 1824, (7 Stats., 232), the Quapaws ceded their tribal domain, which was located in the Territory of Arkansas, to the United States, for and in consideration of certain money payments and other benefits, including domicile and membership in the Caddo Tribe residing on or near the Red River.

They found their new location unfit for residence on account of climatic conditions and a new Treaty was negotiated with them, by the United States, in the year 1833, (7 Stat. 424), by Article 1 of which they relinquished and conveyed their lands in the Caddo country to the United States. The consideration for such conveyance, as set forth in Article II of said Treaty, was the promise of the Government to convey to them 150 Sections of land in the district now embraced in Ottawa County, Oklahoma, expressed in the following terms:

> "The United States agree to convey the same patent, to them and their descendents as long as they shall exist as a nation or continue to reside thereon, and they also agree to protect them in their new residence, against all interruption or disturbance from any other tribe or nation of Indians or from any other person or persons whatever."

It may be remarked, in passing, that this guarantee, which should protect the Quapaws from the forcible taking of their lands by the State of Oklahoma, whether

under the guise of taxation or otherwise, and from the assertion of any right in or to said lands, has never been rescinded or withdrawn, by any law or treaty, and that this treaty obligation stands today with all of its original force and effect, putting at rest effectively the claim of the State that the descendents (heirs) of the Quapaws seceeed to the ancestral estates of their forefathers save and only by the consent and grace of the State, subject to a price or penalty for such succession termed and designated as an "Inheritance Tax."

The United States never did convey these lands to the Quapaws in conformity with its agreement, as set forth above, and after living upon such lands for many years, as a community, the Quapaws undertook, under the advice of an adopted member, to divide or allot their domain among their members, pursuant to an Act of the National Council approved March 23, 1893.

Congress, by Act of March 2, 1895, (29 Stat., 876, 907), ratified and confirmed these allotments, subject to necessary changes and corrections, and authorized the Secretary of the Interior to issue patents accordingly, with the following proviso:

> "*Provided*, That said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents,"

which provision was incorporated in the patents for the lands herein involved, issued in the month of September, 1896.

The patents issued to the Quapaws, aside from the fact that the Quapaw Nation acquired the legal title thereto, are in form and effect similar to the deeds issued

to the Creek allottees, by the Principal Chief of that Nation, subject to restrictions on alienation.

The status of the Creek title is defined in the follownig excerpt from the decision of the United States Supreme Court in the case of *Tiger* v. *Western Investment Company*, (221 U. S., 286, 316):

> "The inherited lands, *though otherwise held in* fee, were inalienable without the consent of the Secretary of the Interior, until August, 1907, by virtue of the Act of Congress." (Italics supplied.)

In the same decision the Supreme Court quoted at length (page 312-313) from the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Beck* v. *Flourney Livestock Company*, (65 Federal 30, 35), relating to a case involving lands that were patented in trust, containing the following sentence:

> "It is competent for a private donor, by deed or other conveyance, to create an estate of that character; that is to say, it is competent for a private person to make a conveyance of real property, and to withhold from the donee, for a season, the power to sell or otherwise dispose of it. And we can conceive no sufficient reason why the United States, in the exercise of its sovereign power, should be denied the right to impose similar limitations, especially when it is dealing with a dependent race like the Indians, who have always been regarded as the wards of the Government."

From the foregoing it is apparent that the Supreme Court looked upon conveyances of Indian lands by deeds made subject to restrictions on alienation as being of substantially the same effect as conveyances made by trust

patents. Accordingly, appellees contend that the decisions of the courts which preserve the jurisdiction of the Government over trust lands are equally applicable to lands conveyed to Indians by ordinary deeds containing restrictions on alienation.

If there were any question on this point as to Quapaw lands the matter has been set at rest by the decision of the Supreme Court of the United States in the case of the *United States* v. *Bowling*, (256 U. S., 484), wherein the Court discusses fully the two classes of conveyances and draws the conclusion that the same rules are applicable to both respecting the jurisdiction of the United States in probate matters.

And, in this connection, it must be borne in mind, that, contrary to the rule in the Five Civilized Tribes, restrictions do not terminate as to Quapaw allotments with the death of the allottee, but continue for the full 25 years the property is to be held in trust under supervision, and that the restrictions run with the land and apply to the heirs as well as to the original allottee.

—*Goodrum* v. *Buffalo*, 104 S. W., 942, 944;

—*Bowling* v. *United States*, 191 Federal 19.

That the Government has preserved its distinct sovereignty respecting Quapaw affairs, and especially in Probate matters, is a fact which does not require extended argument.

—*United States* v. *Bowling*, 256 U .S., 484;

—*Blansett* v. *Cardin*, 256 U. S., 319.

The general principle that the United States retains its supreme jurisdiction over restricted lands is announced

with renewed force in a recent opinion of the Supreme Court of the United States, delivered April 7, 1924, in the case of the *Sperry Oil Company, et al* v. *Pearl Chisholm*, 264 U. S. 488, wherein the Court refers at some length, as a precedent, to the case of *Blansett* v. *Cardin, supra.* In fact, the ruling in the Chisholm case is controlling in this, as appears from the 5th paragraph of the syllabus which reads as follows:

> "5. The provision of the Oklahoma Enabling Act that all laws in force in Oklahoma Territory at the time of the admission of the State should be in force throughout the State, 'except as modified or changed by this Act of by the Constitution of the State', related only to laws affecting the citizens of the State generally, and did not authorize the application of such laws in contravention of acts passed by Congress in reference to the property of Indians under the power expressly reserved in the Enabling Act itself."

The same principle, as well as the line of demarcation between the respective fields of Federal and State Sovereignty, is clearly enunciated in a decision of the Supreme Court of Oklahoma rendered January 21, 1921, in the case of *Malone* v. *Walmsley*, (80 Okla., 181, 195 Pac., 495), which is a land-mark in the exposition of the State law both on account of the point herein mentioned and as to the construction of the Enabling Act under which Oklahoma was admitted into the Union, (34 Stat. 267). In this decision the Court said: (Page 486)

> "It is now well settled in this jurisdiction that the county courts, in approving conveyances of full-blood Indian hears, perform the duty of Federal Agents, and are controlled and regulated by the laws of Congress, and in determining the validity of

the acts of the county court in approving conveyances executed by Indian heirs we must look solely to the Acts of Congress."

The Court, in the same decision, also included the following excerpt from the decision of the Supreme Court of Oklahoma in *Collins Inv. Co., et al.* v. *Beard,* (46 Okla. 310, 148 Pac. 846): (Page 485)

> "The statutes referred to above need no analysis, or even a construction for the reason that when the question of the removal of restrictions on allotted lands, or the right of alienation of such lands, or the power of alienation is involved, we must look to the Acts of Congress and to those Acts and Laws alone. In other words, if a State law, by its language or through its proper construction or its operation would permit the alienation of a restricted Indian allotment, or render a deed thereto effective, where the land would not be alienable, or the deed thereto effective, under the Acts of Congress dealing with the subject matter, *then the State laws fail.* (italics supplied); and this because the Federal Government retained jurisdiction in these Indian matters to the extent stated in the Enabling Act, under the terms by which Oklahoma became a State; and this reservation of jurisdiction was assented to in the Constitution which the people adopted."

Without specific reference to all of the Acts in question, plaintiffs request the Court to note that the Department of the Interior is vested with jurisdiction under Federal law with complete jurisdiction, *in probate matters,* in the Quapaw Agency, as follows:

1. To determine the heirs of deceased allottees.
2. To approve the wills of Quapaw allottees.
3. To partition their inherited lands.

4. To supervise the sale of such lands and to hold the proceeds in trust or to disburse the same for the benefit of the heirs.

5. To exact a fee of each beneficiary, in the nature of a death tax or inheritance tax, to cover costs of probate administration.

Obviously the retention of these powers by the General government evidences that it has not yet committed the administration of Quapaw Probate matters to the County Courts and that such matters are not within the jurisdiction of such courts, and hence not within the purview of the State's Inheritance laws.

In this connection, attention is invited to this 5th of powers enumerated above, which is regularly exercised pursuant to the Act of Congress of May 18, 1916, c. 125, Section 1, (Compiled Stats., U. S., Sec. 4227). This is in effect an Inheritance tax, to be deducted from the estate, and it would be an over-assumption to conclude that, having exacted such a charge for services to be performed by Federal officials, Congress ever contemplated a second death charge would be made by another sovereignty, to-wit, the State, wholly lacking in Probate functions in the premises. More particularly does it argue against the proposition that the Indian heir takes only by the grace of the State, upon such terms as it may exact.

It may be inquired when, if ever, does the jurisdiction of the State attach? The answer appears to be that it attaches when the particular matter is no longer in process of administration by the Government officers. This is the rule in Public Land matters and it has been so held in numerous cases. Prominent among these is the case of

Parcher v. *Gillen*, (26 L. D. 34) which was decided January 17, 1898, in a decision prepared by Mr. Justice Van Deventer, who was then Assistant Attorney General for the Interior Department, wherein it was held that the final act of the Secretary marks the point where the jurisdiction of the State begins. And in the case of *Doc. Jim* (32 L. D. 291), the same ruling was made with respect to the jurisdiction of the Secretary in cases involving Indian allotments as was made concerning homesteads on public lands. In the case of the latter, the Department's jurisdiction is exhausted with the issuing of the final patent; in Indian matters it ends with the termination of the trust or restricted period.

These cases were successfully relied upon by the Government in the case of *McCurdy* v. *United States*, 264 U. S. 484, decided by the Supreme Court of the United States April 7, 1924, in favor of the United States.

The latter case involved the taxation of Osage surplus lands which were expressly subjected to taxation by Act of Congress. The taxes involved were those levied for the year 1909, but at the time the assessment was made the allotments, although duly scheduled, had not been consummated by final approval of the tribal deeds to the allottees. It was claimed by the Government that the lands could not be assessed for taxation while the allotments were in process of administration by the Interior Department, and its contention was upheld by the Court.

Section 5 of the Act of the Legislature of Oklahoma of March 25, 1919 (S. L. 1919, p. 429) reads, in part, as follows:

> "Every such tax shall be and remain a lien upon the property transferred until paid."

The Act of Congress of March 2, 1895, (28 Stat. 876, 907) contains the following provision, which was carried into the patents to the Quapaws:

> "*Provided*, That said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents."

This restriction was extended by the Act of Congress of March 3, 1921 (41 Stat., 1225, 1248), which reads as follows:

> "(a) Sec. 26. That section 1 of the Act of Congress approved March 2, 1895, (Twenty-eighth Statutes at Large, page 907), in so far as the same relates to the allotments of land to the Quapaw Indians and to restrictions against alienation of said allotments, be, and the same is hereby, amended so as to provide that the restrictions which now exist against the alienation of the lands allotted to and allotted lands inherited by the Quapaw Indians named in the letter of January 15, 1921, of the Secretary of the Interior, to-wit: (naming John Beaver and others, including Benjamin Quapaw), and including any Quapaw allotted or inherited lands in which any of the said named Indians have any undivided interests, be, and the same are hereby, extended for the further and additional period of twenty-five years from the date of this Act: *Provided, however*, That the Secretary of the Interior may, with or without application of the Indian owner, remove such restrictions, wholly or in part, after he has found such Indian owner to be as competent as the average white man to conduct his own business affairs with benefit to himself, under such rules and regulations as he may prescribe in regard thereto, and concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians: *Provided, further*, That all said lands allotted to or inherited by the Quapaw Indians may, when subject to restrictions against alienation, be leased for mining purposes for such period of time and under such rules, regulations,

terms and conditions only as may be prescribed by the Secretary of the Interior, and said lands while restricted against alienation may be leased for mining purposes only as provided herein: *And provided further,* That the production of minerals on said lands may be taxed by the State of Oklahoma in all respects the same as that produced on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid from out of the individual Indian funds held under his supervision, belonging to the Indian owner of the land, the tax so assessed against the royalty interests of the respective Indian owner in such production: *Provided, however,* That such tax shall not become a lien or charge of any kind or character against the land or other property of said Indian owner."

It is improbable that the Legislature of the State of Oklahoma intended, even if it had the power, to apply the said Inheritance act of 1919, or the previous Act of March 15, 1915 (S. L. 1915, p. 215) to any matter wherein enforcement and collection would involve a conflict with the laws of the United States, and yet such would be the inevitable result of such action, if attempted, by reason of the irreconcilable nature of the Federal and State laws.

Referring to the concluding part of Section 26 of the Act quoted above, two things will be noted: (1) Affirmative legislation was required to make these lands subject to the gross-production tax, and (2) That tax, though permitted, is not to become a lien on the land or property of the Quapaws. From which it may be safely reasoned, that, *without the consent* of Congress, there can be no tax, and, of course, no lien in such a case, where the land is inalienable.

The conflict between the laws appears from another viewpoint. If the State can take away any part of the allot-

ment of a Quapaw, whether to enforce a death tax, or for any other reason, it can interfere with the even operation of the Federal restrictive law which runs for a *full term of twenty-five years*, and not for the mere life of the allottee. Under the Federal law, the property is to be held intact, for whom and for such reasons as the government may have in mind, for the full period; but, under the State law, in case of a death, the preservation of the estate thereafter is possible only in a diminished form. On the one hand, the Government says: "We desire to preserve this property in its entirety for the full term, regardless of whether the allottee survives the period or not." On the other hand, the State says: "We think it long enough to hold the property intact if we thus preserve it during the life of the allottee."

If the power be once conceded to thus diminish, burden and impair a restricted estate, where will the destructive process end? Obviously the Legislature would be bound by no limitation save its own will, and could strike down, effectively, all legislation of Congress imposing restrictions that do not end with death.

But counsel for appellant brush all this aside with the sweeping assertion that the Inheritance Tax is a price for a *privilege*, and hence within the power of the State to prescribe because the privilege of inheriting property comes by grace of the State. They forget, however, that there are other privileges as well, which the State also grants, such as the privilege of doing business within the State for price, and that as to such, this Court has ruled *there must be no interference with a Federal instrumentality.* Illustrative of this is the decision of the Court in *Choctaw & Gulf R. R. Co.* v. *Harrison*, 235 U. S. 292, 298, wherein,

speaking of the tax on the business of mining the coal lands of the Choctaws and Chickasaws, the Court said:

> "From the foregoing it seems that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect. *Such an agency cannot be subjected to an occupation or privilege tax.*" (Italics ours).

In *Brown* v. *Maryland,* 12 Wheat. 419, 444, Chief Justice Marshall, holding that a tax on the occupation of an importer was a tax on imports, said:

> "It is impossible to disguise from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on an article imported only for sale, is a tax on the article itself."

In like manner, there is no practical difference between taxing an Indian estate *directly* and levying a tax on the *privilege* of inheriting, where the tax is collected in each case from the property or is a burden on the beneficiary. Whether it is called, bluntly, a tax, or a license privilege, the instrumentality of the government is impaired precisely as much in one case as in the other.

II.

The State Inheritance Tax Laws are repugnant to and inconsistent with the Constitution of the State of Oklahoma and the Enabling Act of Congress admitting the State into the Union.

It is immaterial in this connection whether the State Inheritance Tax should be classed as a property or privilege tax so long as it contemplates the *taking* of a part of the property transmitted, for it is tantamount to asserting a claim or right to the property, as well as providing for a disposition of it contrary to that contemplated by Congress.

Section 1 of the Enabling Act contains an inhibition against any action that would limit or affect the authority of the Government in Indian matters. Obviously, a State law that would create a lien where Congress had declared land should be inalienable would come within this inhibition, as would also a State law which recognized the full force of a restrictive act only during the life of the allottee regardless of the term prescribed by Congress.

In Section 3 of Article 1 of the Constitution the people disclaim all *right* and title to Indian lands, while subject to Government control and supervision. How, then, can the right be asserted, in the exercise of the State's power to tax, to reach out and take for its own benefit any part of a restricted estate, in the face of this constitutional provision? If so, the State's disclaimer is not sincere or binding.

Similar provisions of law were construed affecting Kansas in the case of "*The Kansas Indians.*" 5 Wall. 737, 755. See also, *Stearns* v. *Minn*, 179 U. S. 249.

Counsel for appellant contend that the State laws of descent and distribution have applied since statehood to the Quapaws, and, with that proposition as a major premise, argued inferentially that a collateral act laying an inheritance tax must also apply, the deduction being that the State gave the inheritance right and hence could name its price for so doing.

In the first place, the State, as has been shown in a previous connection, did not give that right, which was, instead, derived from a treaty grant.

In the second place, it does not follow that a particular law of succession, as applied to Indian inheritances, is in fact a *State*, as distinguished from a *Federal* act. On the contrary, appellees contend that where *State Laws* have been made the rule for the determination of the restricted Indian heirs, such laws are really *Federal Laws*, by adoption.

This is illustrated by the decision of the United States Court in Oklahoma rendered in the year 1910, in the case of *United States* v. *Bellm*, (182 Fed. 161), wherein the Court construed the General Allotment Act of February 8, 1887, as amended by the Act of February 28, 1891, which provided that the laws of the State of Kansas regulating descent and partition of real estate should apply to lands in the Indian Territory allotted in severalty, and held that said proviso adopting the laws of descent of the State was merely for the purpose of providing a rule by which the heirs should be determined and that there was no intention of abrogating the trust in any case.

It is respectfully submitted that it was never intended by any act of Congress to supersede, without qualifications, the Congressional laws pertaining to probate matters by

State laws in lieu thereof. This requires us to go back to the original Act of Congress of May 2, 1890, (26 Stats. 81), putting into effect (adopting) the laws of Arkansas in the Indian Territory. The laws which were so adopted were such as, in the language of Section 31 of that Act, were "*not locally inapplicable or in conflict with any law of Congress.*

Later, by Act of April 28, 1904, (33 Stats. 573), Congress declared that all statutes of Arkansas "*theretofore put in force*" in the Indian Territory should apply generally to all persons and estates therein.

Still later, when the State Constitution became effective, it continued in force in that part of the State which was originally included in the Indian Territory all laws which were in force therein *when the State was admitted to the Union.*

Tracing these acts back, as we would an abstract of title, it would seem that Congress never meant to consent to any legislation in these matters in conflict with its own laws and that it never authorized any departure in that respect from the original terms of said Act of May 2, 1890.

Even if it has so consented, it was free to reassert at any time its Constitutional powers with respect to Indian affairs.

Turning now to the contention of counsel for the appellant, as presented in their brief, to show that the sovereign powers acquired by the State of Oklahoma were not restricted or limited by the provisions in the Enabling Act and in the State Constitution, with respect to Indian matters, it would seem that the law upon this point is too well settled to merit serious con-

troversy. It is sufficient, perhaps, to call attention again to the decision of the State Supreme Court in *Malone* v. *Wamsley, supra,* and especially to the latter portion of the excerpt from the opinion quoted therein which is quoted on page 11 hereof.

It may be remarked, however, in this connection, that in one case specially relied upon by counsel for appellant, to-wit, the case of *Coyle* v. *Okla.,* (221 U. S. 559), the conclusions of the Court, set forth in the 5th paragraph of the syllabus, wholly upholds the authority of Congress to embrace in an Enabling Act conditions relating to Indian affairs.

Aside from all other considerations, appellant, as an officer of the State, should not be heard to repudiate its covenant with the United States, especially as the same has been upheld by the Supreme Court of the State.

Referring to the arguments of the appellant based upon the State citizenship of appellees, it would seem that sufficient answer thereto is found in the decision of the United States Supreme Court in *Tiger* v. *Western Investment Co., supra,* as well as in the decisions of that Court in numerous other cases holding there is no necessary conflict between State citizenship and national guardianship and nothing can take such Indians out from the general rules applicable to the owners of restricted or trust estates. It was also held in *United States* v. *Bowling,* 256 U. S. 484, which arose in the Quapaw Agency.

There is still another aspect of the State legislation deserving of consideration which appellees believe demonstrates the inapplicability of the State Inheritance Tax law to these restricted estates, as will be seen from a careful

reading of certain portions thereof. For example, by examination of Section 14 of the Act of 1919, it will be found that the County Court is primarily the forum for the determination and collection of State Inheritance taxes, and that it is empowered to act in those cases which are *subject to its jurisdiction.* And yet it is obviously powerless as to restricted estates to take over the same, through the appointment of administrators, or to otherwise administer the Act. It is fair to conclude, therefore, that the Act was not intended by the legislators to apply to such estates. It has been held by the Supreme Court of Oklahoma in the case of *In Re Harkness Estate,* (83 Okla. 107, 204 Pac. 911) that to give a court authority to impose an inheritance tax, it must have jurisdiction of the parties or the subject matter. Yet it is lacking as to such jurisdiction in the instant case.

We quote, in this connection, from page 13 of the opinion as follows:

> "Jurisdiction means authority of the matter to be determined. It means power to order, to adjudge, and to enforce judgment. The extent of jurisdiction of State courts is to be determined from two sources, viz., from the power conferred by express or implied provisions of State law, and by express or implied limitations of Federal law. The courts of one state cannot invade the exclusive province of, nor control the domains of, courts of another state without transcending Federal limitations."

Attention is also invited to the provisions of the State Inheritance Tax laws making the tax a lien on the property, for the reason that this very provision should cause the Act to fail, applying the opinion of the State Supreme Court in *Collins Investment Co.* v. *Beard,* 46 Okla. 310, 148 Pac. 846. This because the State law provides for the alien-

ation of Indian lands (if applied to these restricted estates) which the Federal law forbids, thereby rendering the decision in that case clearly applicable.

Counsel for appellant have followed their argument so far that they have been compelled to reject the Constitution of the State, as a compact which it could not enter into. On the contrary, we rely upon that instrument as a sure protection for appellees.

Section 3 of Article 1 of the State Constitution contains the following provision:

> "The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation."

With this provision in mind, appellees respectfully submit to the Court that the State cannot consistently assert the right, or enforce said right, to take, from any restricted Indian estate a portion thereof for the privilege of inheriting such estate. This for the reason that such action is avowedly predicated upon the supposed right or interest of the State in the property, as grantor of such privilege. Obviously it could not assume or undertake to grant any interest or right which it did not claim to possess at the time of making such grant, but, any such claim would be repugnant to its disclaimer as set forth in said Section 3 of Article 1 of the State Constitution which is quoted above.

The faith of the State is also pledged by the provisions of Section 6 of Article X of the Constitution of Oklahoma, as follows, by promising to refrain from taxing—

"All property owned by Morrow Indian Orphan Home, * * * * and such property as may be exempt by reason of treaty stipulation, existing between the Indians and the United States Government, or by Federal laws, during the effect of such treaties or Federal laws."

III.

If any kind or class of property is itself exempt from taxation in pursuance of a governmental policy, as a Federal Instrumentality, it follows, as a corollary, that it cannot consistently be subjected to any indirect form of taxation such as an income, gross production or privilege tax.

If, for example, a given property is set apart for a special purpose, such as the support of a public school or other institution, what benefit would accrue to the beneficiaries if the incomes should be applied to other purposes? Obviously, the income from property is that which makes it valuable and a property which produces no income, or the income from which is lost or diverted, becomes a burden. Accordingly, the principle has been recognized by the Supreme Court that a Federal Agency devoted to the development of restricted Indian lands, cannot be subjected to the State Income tax.

In the case of an exemption of restricted property for a term of years—not necessarily for the life or benefit of any particular person—as in cases where the restrictions run with the land, it is easy to see that the deduction of an Inheritance tax might operate quite as effectively to thwart the plans of the Government as would the loss of the income from such property. In either case, the value of the property set aside for the particular use or purpose would suffor a diminution.

—*Evans* v. *Gore*, 253 U. S. 345;
—*Gillespie* v. *Oklahoma*, 257 U. S. 501;

—*Shaffer* v. *Carter*, 252 U. S.37;

—*Choctaw & Gulf R. R. Co.* v. *Harrison*, 235 U. S. 292;

—*In re Gross Production Tax of Wolverine Oil Co.*, 53 Okla. 24;

—*Indian Territory Illuminating Co.* v. *State of Oklahoma*, 240 U. S. 522;

—*Pollock* v. *Loan & Trust Co.*, 157 U. S. 429;

—*Brown* v. *Maryland*, 12 Wheat. 419;

—*Dobbins* v. *Erie Co. Commissioners*, 16 Pet. 435;

—*Oahu Railway & Land Co.* v. *Pratt*, 14 Hawaiian Repts., 126;

—*Opinion of the Attorney General* of March 15, 1924, in the matter of the taxation of incomes from restricted lands in the Five Civilized Tribes;

—*Opinion of the Attorney General* in the matter of the taxation of incomes from restricted lands in the Quapaw Agency.

IV.

Where Indian lands are unequivocally declared inalienable and are held under governmental control and supervision, the restriction is a limitation upon involuntary, as well as voluntary, alienation and renders such lands exempt from all forms of taxation.

This rule has been announced in substance both in cases where the lands were allotted under trust patents and under restricted fee patents. The form of conveyance is not material so long as the Government retains control and supervision and has any duty to perform. Of course this rule does not apply where there are affirmative words in a statute giving the right to tax a part of the lands of an Indian, as in the case of the surplus of the Osages, or to impose a gross production tax as was done in the case of those Indians.

The law is stated on page 955 of Volume 6 of the Encyclopedia of U. S. Supreme Court Reports, as follows:

> "And treaties exempting Indian lands from levy, sale and forfeiture are to be construed as exempting them from levy and sale for nonpayment of taxes. Lands allotted to individual members of Indian tribes patented to them with express restriction that they are not to be sold without the consent of the government, or lands allotted to Indians and held in trust by the United States for the benefit of the Indians, or improvements on personal property upon Indian allotments held in trust for Indians by the United States, are not subject to taxation by the state within which the allotments are situated.
>
> —*The Kansas Indians*, 5 Wall. 761;
>
> —*Stearns* v. *Minn*, 179 U. S. 249;
>
> —*United States* v. *Rickert*, 188 U. S. 432."

In the case of *The Kansas Indians, supra*, the lands had been conveyed to the Indians subject to the restriction that said lands should not be sold by the grantee or his heirs without the consent of the Secretary of the Interior. Construing this language in connection with the Act admitting Kansas to the Union, which Act employed substantially the same words as that admitting Oklahoma to statehood, the Supreme Court of the United States held invalid a law of Kansas which attempted to subject such lands to taxation.

Here it may be noted that the language attaching restrictions to the lands of the Kansas Indians was the same, in effect, as that employed with respect to Quapaw lands for the same purpose.

In the case of *Morrow et al.* v. *United States*, 243 Fed. 854, the doctrine of non-taxability was carried to a further degree. There an attempt had been made to levy taxes

upon lands from which restrictions had been removed, such removal being prior to the date of issuance of final or fee patents. The Act under which the lands were allotted was the General Allotment Act of February 8, 1887, (24 Stat. 388), which contained no exemption from taxation but did provide against alienation and incumbrance.

The question was brought directly home in the case entitled, *In re Skelton Lead & Zinc Co.'s Gross Production Tax*, which affected Quapaw restricted lands. The Supreme Court of Oklahoma held in that case (speaking of the 1919 tax) that the returns from such lands were exempt, by reason of Federal restrictions, under Art. X, Sec. 6 of the State Constitution, 81 Okla. 134, 197 Pac. 495.

V.

Exemptions in express words are not necessary to render Indian lands non-taxable if it is clearly intended the lands are to be inalienable.

On this point we quote from Note No. 25, page 955, Volume 6, Encyclopedia of United States Supreme Court Reports:

> "Lands of Shawnee Indians held in severalty were not subject to State taxation, although in the last treaty with the Shawnees, the one authorizing the allotments there was no express stipulation for exemption from taxation. The *Kansas Indians*, 5 Wall. 737, 18 L. Ed. 667."

A similar question as to exemption arose in Maryland with respect to the attempt of that State to tax National Banks, resulting in the case of *Osborne* v. *United States Bank*, 9 Wheaton 740, which was an injunction proceeding to restrain the collection of of the tax. In that case Chief Justice Marshall decided two questions which are

involved in this case we are now presenting, to-wit, whether exemptions must necessarily be in express words. and, 2nd, whether a suit in equity was the proper course to pursue for relief. The first was decided in the negative; the second, in the affirmative.

With respect to the matter of exemption, the power of a State to tax National Banks, the Chief Justice said: (Page 866)

> "It is contended, that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not be to implead by the court. • • •
>
> It is not unusual for a legislative act to involve consequences which are not expressed. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance."

The intention of Congress as to the payment of State taxes is further disclosed by the general act of March 1, 1907, (34 Stat. 1016), which provides for the payment of taxes by the Commissioner of Indian Affairs, from trust funds, "in any case where restrictions have been removed".

VI.

The decisions cited by counsel for Appellant for the purpose of showing that State inheritance taxes have been upheld, notwithstanding the government has some form of interest in the inherited property, have no controlling force in determining the validity of an inheritance tax on restricted Indian lands.

It is contended by counsel for appellant that there is an analogy between estates in which the Government had, or has, a proprietary or other interest, by reason of

its past or present relation thereto, and restricted Indian estates held in trust by the Government, and that, if a state inheritance tax in valid as to the one it must be valid as to the other.

In support of these contentions they reply mainly upon two decisions of the Supreme Court of the United States. One of these decisions was rendered in the case of *Plummer* v. *Coler*, (178 U. S. 115), wherein the Court held that an estate was subject to the inheritance tax of the State of New York, notwithstanding the said estate included Government bonds which contained a clause rendering the same non-taxable. Two contentions were presented: (1) that the inheritance charge was a tax on property and hence illegal as to the bonds, and, (2) that the tax impaired the borrowing power of the Government. The Court held that the tax was a transfer charge and not a property tax, and that as a matter of fact, it did not appreciably injure the Government's borrowing power.

It will be observed first, that in this case the title had passed out of the Government before the inheritance tax was claimed. It therefore, did not affect property of the United States as a tax. The second question was one of policy and that, the Court held, was not material.

Clearly, there is no logical comparison between such a case and the imposition of an inheritance tax upon restricted Indian property which has not passed out of government possession or control, and which is being held, and must be held unimpaired, for the purposes of the trust, any dimunition of which may defeat the purpose for which the trust was created.

The other case was that of *United States* v. *Perkins*, (163 U. S. 625), which also arose in New York, and which involved the legality of a State Inheritance Tax on a bequest to the United States.

But little comment need be made as to this case as the estates was not the property of the United States at or before the time the inheritance charge attached, and the United States had no interest, direct or indirect, therein, before the will was executed. The United States never had any interest in the estate except in the net proceeds. Clearly, this case is no more analagous than the former to cases of the kind which are before the Court in this proceeding.

VII.

The decisions cited by Counsel for Appellant to show that the United States has no jurisdiction of Indian lands located in new States, after the admission of such States, have no controlling force in the determination of the question before the Court. This, for the reason that there is nothing in those decisions in derogation of the power of Congress to act in matters committed to its jurisdiction by the National Constitution even though the subject matter may be located within the limits of a State.

The case of *Coyle* v. *Oklahoma*, (Coyle v. Smith), 221 U. S. 568, 55 L. Ed. 853, is quoted at length in Appellant's brief to show that the State has or should have sole jurisdiction in Quapaw probate matters notwithstanding the Enabling Act. That case simply turned upon the authority of the State, after its admission into the Union, to change the location of its capital contrary to a provision in said Act requiring that no change be made prior to 1913. This requirement was one which Congress was not constitutionally authorized to make and hence not

binding on the State. But this ruling has no application to an Indian question where Congress has plenary power under the Constitution. In fact, the 5th paragraph of the syllabue in this very case upholds us in this view. The Coyle case is not, therefore, an authority for appellant's contention, notwithstanding it is referred to in his brief in the court below as "the most applicable case."

Counsel for Appellant quote at length in their brief, from the decision of the Supreme Court of the United States in the South Carolina liquor case, *South Carolina* v. *United States*, 199 U. S. 437, wherein it was held that internal revenue taxes were due the government in connection with the liquor business in that State, owned and supervised by the State. This decision was bottomed on the Supreme Law clause of the United States Constitution and the constitutional authority of Congress to lay and collect duties, imposts and excises. If it has any place in the argument, it justifies Congress in enacting the legislation in question, for the control and disposition of Indian estates, in the exercise of its constitutoinal powers respecting Indian affairs.

It is argued by counsel for the Appellant, and perhaps correctly, that the question of the propriety of taxing property owned by a sovereign turns upon whether such property is held for a governmental purpose or merely as an incident of conducting a business, as such. In the South Carolina liquor case it was considered that the property was held and operated as a business. But it is plain that this is no precedent for taxation by the State in an Indian case, where a national policy is involved, fixed by constitutional provision and effectuated

by laws and treaties, pursuant to which trust estates are held and supervised. As the Circuit Court of Appeals said, in *United States* v. *Thurston County, Nebraska, et al.*, 74 C. C. A. 430:

> "The *lands* and their *proceeds* so long as they are *held* and *controlled* by the United States and the term of the trust has not expired, *are alike instrumentalities* employed by it in the lawful exercise of its powers of government to protect, support, and instruct the Indians for whose benefit the complainant holds them, and *they are not subject to taxation by any State or County.*" (Italics supplied.)

In Appellant's brief reference is made to that part of the estate consisting of money on hand at the death of the decedent, and the conclusion is drawn that such part of the estate is clearly subject to the inheritance tax. This inference, we believe, is entirely unwarranted for the reason that said money accrued to the credit of the deceased in the form of royalties from restricted Indian lands, and was paid to, and supervised by, the Interior Department, pursuant to its regulations. The royalties had the same restricted status and were subject to the same supervision as he lands from which they were derived.

—*Parker* v. *Riley*, 250 U. S. 66;
—*Parker* v. *Richard*, 250 U. S. 235.

The rulings in these three cases, considered together, should dispel any doubt that might arise as to whether restricted lands and *the proceeds derived therefrom* stand upon different planes while held in trust by the United States. Be that as it may the stipulation in this case, and the allegations of the Amended Bill, confine the issues here, as below, to the taxable status of the inherited allotments.

It was contended in defendant's (now appellant) brief, in the court below, that full and complete probate jurisdiction was conferred upon the Federal territorial courts and that such jurisdiction was passed on to the State Courts, and from these premises the deduction was drawn that:

> "The transfer of this extensive power over probate matters, to the State Courts, must, of necessity, operate as an abrogation of any potential authority of the Federal Government in relation to decedent's estates."

That the premises are unsound on which this conconclusion is based will be seen by reference to the decision of the Supreme Court of Oklahoma in *Coleman* v. *Battiest*, 65 Okla. 71, 162 Pac. 786, holding that the district courts of the State had no jurisdiction—and they were the successors of the territorial courts—to order and decree the partition of the inherited lands of full-bloods. And, it should be borne in mind, in this connection, that Congress deemed it necessary, in order to remedy the situation, to enact the Act of June 14, 1918, (40 Stat. 606), entitled:

> "An Act to provide for a determination of heirship in cases of deceased members of the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Tribes of Indians in Oklahoma, conferring jurisdiction upon district courts to partition lands belonging to full-blood heirs of allottees of the Five Civilized Tribes, and for other purposes."

Construing the Act in *State ex rel. Miller* v. *Huser*, 76 Okla. 130, 184 Pac. 113, the Supreme Court of Oklahoma held that said Act is not unconstitutional and void, nor in contravention of United States Constitution,

Article 3, Section 2, but is a proper exercise of the political and administrative power and duty of Congress to legislate for restricted Indians of the Five Civilized Tribes concerning their property during the continuance of the national guardianship over such restricted Indians.

It is therefore evident from this decision, as well as the Act which it construes, that the courts of Oklahoma had not been vested with full probate powers *by previous legislation*, and had not superseded the Secretary of the Interior in the supervision of Indian matters. Hence, the claim of appellant, that said courts acquired full jurisdiction over these Quapaw estates must fail. It follows that such courts could not, in view of the lack of such jurisdiction, enforce the State inheritance tax. *In re*: *Harkness Estate*, 83 Okla. 107, 204 Pac. 911.

On the other hand, under the reserved and constitutional powers of the National Government, it is obvious that the Secretary of the Interior is legally vested with quasi-judicial powers, in probate matters, concerning the Quapaws, for which statement the decisions of the Supreme Court of the United States, in the Bowling and Blansett cases, *supra.*, are ample authority.

Counsel for Appellant contend that, notwithstanding the provisions of the Enabling Act, the State has inherent rights in probate matters which exclude the possibility of any Federal jurisdiction concerning the same. This is a tacit admission of our contention as to the construction and effect of said Act and of the agreement of the State, as embodied in its Constitution, which, we contend, preclude the exercise of any authority, or the assertion of any right (by taxation, or otherwise) by the State over these Indian estates while the National supervision con-

tinues. The argument of the appellant, therefore, resolves itself into a challenge as to the constitutionality of the Enabling Act.

According to the decision of Hon. R. L. Williams, in the case of *United States* v. *Board of Commissioners of McIntosh County; Same* v. *Stuckey, County Treasurer; Same* v. *Ranson, County Treasurer*, 271 Fed. 747, similar provisions to those in the Oklahoma Enabling Act, relating to the powers of the National Government, were incorporated in the Enabling Acts applicable to every State admitted to the Union except five. Judge Williams evidently did not question the validity of these Acts; neither did the Supreme Court of this State question them in the case of *Malone* v. *Walmsley*, or in the case of *Collins Inv. Co.. et al.* v. *Beard*, both of which are cited and quoted on page 11 of this brief. Nor was there any exception taken to similar provisions in the Enabling Act construed by the United States Court in the case of *The Kansas Indians*, 5 Wall. 761.

Properly read and understood there is nothing in the cases cited by counsel for the appellant to show that Congress may not legislate as to Indian affairs, after the admission of a State, the same as before, where it has not relinquished its powers. This, because it is vested with such powers by the Constitution of the United Sstates with respect to Indian matters, just as it is vested with authority respecting Interstate Commerce and other matters.

VIII.

The constitutional theory advanced by Counsel for Appellant is another form of the old contention, now obsolete, that the grant of citizenship to Indians was inconsistent with restrictive Indian legislation, and it is so far-reaching and all-inclusive that one of two conclusions must follow: (1) it must be accepted as properly challenging the validity and correctness of the actions and discisions of all Departments of the National Government respecting important Indian matters in Oklahoma, beginning with the Enabling Act, or, (2) it must be rejected as fundamentally unsound.

The contention of counsel for Appellant, based upon his constitutional theory, seems to us to be analagous to the old, and now discarded, theory that Indians upon acquiring citizenship, immediately ceased to be wards of the government.

It is the same argument in another form, that when a community of persons, taken collectively, becomes a State and is vested with the political status of a State, the constitutional powers of the general government terminate with respect to Indian matters.

Counsel for Appellant have pursued this argument so far that they have found it necessary to challenge the constitutionality of several important Acts of Congress, to question the efficacy of the Oklahoma State Constitution and to join issue with the conclusions of this Court and other Federal Courts and of the Supreme Court of Oklahoma.

The contentions of opposing counsel must stand, if at all, upon two premises, to-wit: (1) The Oklahoma Enabling Act is unconstitutional with respect to the powers reserved by Congress over Indian matters; and (2) Indian lands and moneys held in trust and under governmental supervision are not Federal instrumen-

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talities employed by the United States for the benefit of the Indians.

These contentions are in direct conflict with the decision of this Court and of the Supreme Court of Oklahoma, in the cases cited herein, notably in *Sperry Oil & Gas Company* v. *Chisholm,* 264 U. S. 488; *Malone* v. *Walmsley,* 80 Okla. 181, and *United States* v. *Rickert,* 188 U. S. 432, and *United States* v. *Thurston Co.,* 74 C. C. A. 430.

We desire to point out in this connection the scope of Appellant's contentions and the extreme grounds which he attempts to sustain, it being apparent that the argument of opposing counsel leads, directly and inferentially, to the following conclusions:

That the Department of the Interior has no jurisdiction to determine the heirs of restricted Quapaws, to approve their wills, and to handle their estates, with the result that Congress in appropriating money for sixteen years for such purposes in the Quapaw and other tribes, has strained its constitutional powers.

That the Department of the Interior, in maintaining its Heirship Division in the Indian Office for the adjudication of heirship cases and the approval of wills, is responsible for an unwarranted and unlawful use of public funds.

That the laws of Congress, beginning with the Act of June 25, 1910, (36 Stat. 855) relating to the determination of Indian heirs and kindred matters, and numerous acts supplemental thereto, are contrary to, or unwarranted by the Constitution of the United States.

That the Enabling Act of Oklahoma is not constitutional and is not binding upon the State (notwithstanding

the people agreed to it in their constitution) to the extent that it permits the National Government to legislate with respect to Indian matters as fully and completely as it might do during the territorial period.

That the Supreme Courts of the United States and the State of Oklahoma have erred in numerous cases in their construction of the law pertaining to these matters, with the result that decisions, such as the following, must be modified or reversed, to-wit:

—*Collins Inv. Co. et al.* v. *Beard*, 46 Okla. 310, 148 Pac. 846;

—*Malone* v. *Walmsley*, 80 Okla. 181, 195 Pac. 485;

—*Battiest* v. *Coleman*, 65 Okla. 71, 162 Pac. 786;

—*State ex rel. Miller* v. *Huser*, 76 Okla. 130, 184 Pac. 113;

—*The Kansas Indians*, 5 Wall. 761 (and related cases).

—*Hallowell* v. *Commons*, 239 U. S. 506;

—*Blansett* v. *Cardin*, 256 U. S. 319;

—*United States* v. *Bowling*, 256 U. S. 484;

—*Sperry Oil Co., et al.* v. *Chisholm, et al.*, 264 U. S. 488.

When a party rests his case on the unconstitutionality of a statute he takes upon himself the burden of clearly proving the repugnance between the law and the Constitution. In *Fletcher* v. *Peck*, 6 Cranch. 87, Chief Justice Marshall said:

> "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatability with each other."

But the conclusions of Appellant are so far-reaching and all-inclusive that the mind balks at the idea of accepting them. Upon authority, as well as reason, they must be rejected. To quote in substance, the language used by Mr. Justice Brewer in another case, "the reach to which the argument goes demonstrates that it is unsound."

We summarize our position as follows:

1. That restricted Indian lands and the proceeds therefrom, are subject to the sole jurisdiction of the Secretary of the Interior.

2. That the Secretary of the Interior has exercised, and is exercising, probate functions concerning such property, properly and lawfully.

3. That the land, and the proceeds therefrom, are alike Federal instrumentalities for the benefit of the Indians, while the property is held, or controlled, by the Interior Department.

4. That the State Inheritance Tax law is repugnant to the Supreme law clause of the Constitution of the United States, in that it undertakes to fasten a lien upon Indian esates which, by Act of Congress, are inalienable.

5. That the administration of the State Inheritance tax law would require acts contrary to due process of law, in that the compulsory sale of the land to collect the tax must necessarily be made through the County Court, under the State laws, and not with the approval of the Secretary of the Interior, as required by Federal law; and for the further reason that the estates would have to be taken over and administered by State officers.

6. That the State laws governing the descent and

distribution of these estates are, as to the Quapaws, mere rules of succession which have been adopted by Congress for the guidance of Federal Officers.

7. That the Quapaw estates are already subject to a death tax under the Federal law.

8. That the right of the descendents of the Quapaws to hold and possess the estates of their fore-fathers flows from the laws and treaties of the United States and does not come by grace of the State.

9. That the National Government is powerless to create and execute an Indian trust, to run with the land, unimpaired and undepleted, if the right of succession can be denied or in any degree impaired by the State through its inheritance tax laws, the test being not alone the extent to which the law goes at present but rather the extent to which the power might be asserted.

10. That the imposition of the State Inheritance tax, in the case of the transfer of Quapaw estates, would be a burden upon a Federal instrumentality, and that the practical effect would be the same regardless of whether such tax is a property tax or a transfer charge.

11. That the laws of the United States, including the Oklahoma Enabling Act, and the decisions of the State and Federal Courts, pursuant to which these principles and powers are asserted and exercised, are entirely consistent with the Constitution of the United States.

Respectfully submitted,

JOSEPH W. HOWELL,
For the Appellees.

Dated February 24, 1926.

SUPREME COURT OF THE UNITED STATES.

No. 202.—October Term, 1925.

Charles C. Childers, State Auditor of the State of Oklahoma, Appellant, *vs.* John Beaver and Benjamin Quapaw.	Appeal from the District Court of the United States for the Eastern District of Oklahoma.

[April 12, 1926.]

Mr. Justice McReynolds delivered the opinion of the Court.

See-Sah Quapaw, a full-blood Quapaw Indian woman, died March 4, 1920. She owned certain duly allotted lands in Oklahoma, patented by the Secretary of the Interior September 26, 1896, and declared to be "inalienable for a period of twenty-five years" thereafter—all as provided by the Act of March 2, 1895, c. 188, § 1, 28 Stat. 876, 907. Following the State statute of descent, the Secretary declared that the only heirs were her husband and brother—John Beaver and Benjamin Quapaw—full-blood Quapaws. Act June 25, 1910, c. 431, § 1, 36 Stat. 855. *Henrietta First Moon* v. *Starling White Tail*, — U. S. — [March 1, 1926]. Restrictions upon the land were continued for another twenty-five years by the Act of March 3, 1921, c. 119, § 26, 41 Stat. 1225, 1248.

Apparently appellant supposed that the lands passed to the heirs by virtue of the laws of the State and were subject to the inheritance taxes which she laid. He accordingly demanded their payment of appellees and threatened enforcement by summary process and sale of the lands. The court below held that the State had no right to demand the taxes and restrained appellant from attempting to collect them.

The duty of the Secretary of the Interior to determine the heirs according to the State law of descent, is not questioned. Congress provided that the lands should descend and directed how the heirs should be ascertained. It adopted the provisions of the Oklahoma statute as an expression of its own will—the laws of Missouri or Kansas, or any other State, might have been accepted. The lands

really passed under a law of the United States, and not by Oklahoma's permission.

It must be accepted as established that during the trust or restrictive period Congress has power to control lands within a State which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized therein cannot be subjected to taxation by the State without assent of the federal government. *The Kansas Indians*, 5 Wall. 737; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Choctaw, etc., R. R.* v. *Harrison*, 235 U. S. 292; *Hallowell* v. *Commons*, 239 U. S. 506; *Lane* v. *Mickadiet*, 241 U. S. 201; *Jefferson* v. *Fink*, 247 U. S. 288; *Blanset* v. *Cardin*, 256 U. S. 319; *United States* v. *Bowling*, 256 U. S. 484; *McCurdy* v. *United States*, 264 U. S. 484; *Sperry Oil Co.* v. *Chisholm*, 264 U. S. 488.

The decree below must be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.